

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
APPENDIX**

ORIGINAL
WITH PROOF
OF SERVICE

74-1071

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

HAROLD FISHER,

Plaintiff-Appellee,

-against-

HARRIS, UPHAM & CO. INCORPORATED,

Defendant-Appellant.

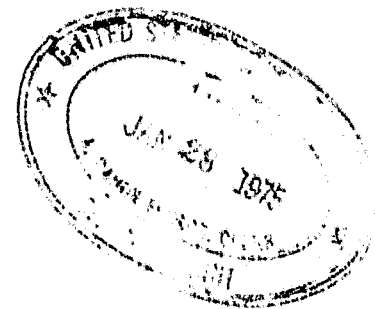
ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTARY APPENDIX TO PLAINTIFF-APPELLEE'S BRIEF

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(4498A)



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VERIFICATION ATTACHED TO "ANSWERS TO INTERROGATORIES"
(DATED AUGUST 13, 1969)

STATE OF NEW YORK)
) ss.:
SOUTHERN DISTRICT OF NEW YORK)

WALTER S. LONG, JR., being duly sworn, deposes and says:

I am a Vice President of Harris, Upham & Co. Incorporated, the defendant in the within action, to whom plaintiff's interrogatories dated August 13, 1969, are directed. I have read the foregoing answers to said interrogatories and know the same to be true of my own knowledge except for those matters stated to be on information and belief, and as to those matters I believe them to be true. The sources of my information and belief are statements and papers relating to the matters in suit. This verification is made by deponent because defendant is a corporation and deponent an officer thereof, to wit, its Vice President.

/s/ Walter S. Long, Jr.
Walter S. Long, Jr.

Sworn to before me this
3rd day of October, 1969.

/s/ Robert A. Barron
Notary Public

ROBERT A. BARRON
Notary Public, State of New York
No. 60-0173775 West. County
Certificate filed in New York County
Commission Expires March 30, 1971

JOSEPH A. FLAHAVEN
NOTARY PUBLIC, State of New York
No. 24-1244350
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1971

VERIFICATION ATTACHED TO "FIRST AMENDED ANSWERS TO INTER-
ROGATORIES" AND "DEFENDANT'S AMENDED ANSWERS TO
INTERROGATORIES DATED MARCH 18, 1970"

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOSEPH A. DWEK, being duly sworn, deposes and says:

I am a Vice President and Assistant Treasurer of Harris, Upham & Co. Inc., the defendant in the within action. I have read the foregoing answers to certain interrogatories directed to defendant by plaintiff as affected by an order of the United States District Court of the Southern District of New York dated and entered September 15, 1970 and know the same to be true of my own knowledge except for the answers provided to Interrogatories No. 5, 7, 8, 9 and 11 of the first set and 1(a), 1(b), 1(c), 5(a), 5(b), 7(b) of the second set, which I relied on information supplied by Mr. William McCarthy, an employee of defendant. For the answer to Interrogatory No. 19 of the first set, I relied on information provided by Mr. Henry Martone, an employee of defendant and its Director of Personnel. For the answer to Interrogatories No. 11(a), 11(b), 11(c), 11(d), 12(a), 12(b), 12(c) and 12(d) of the second set, I relied on information supplied by Mr. Mario J. Abbatiello, an employee of defendant. For all answers I relied on the various records, ledger, memoranda and papers maintained by defendant. As to all those matters on which I relied for information on such records or on information supplied by various employees of defendant, I believe such answers to be true. This

SA-4

VERIFICATION ATTACHED TO "FIRST AMENDED ANSWERS TO INTER-
ROGATORIES" AND "DEFENDANT'S AMENDED ANSWERS TO
INTERROGATORIES DATED MARCH 18, 1970"

verification is made by deponent because defendant is a corporation and
deponent, an officer thereof, to wit, one of its Vice Presidents and its
Assistant Treasurer..

/s/ Joseph A. Dweck
Joseph A. Dweck

Sworn to before me this
5th day of October, 1970.

/s/ Paul F. Robinson

PAUL F. ROBINSON
Notary Public, State of New York
No. 41-8604930
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

PLAINTIFF'S RULE 9(f) AFFIDAVIT SWORN TO AUGUST 12, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
HAROLD FISHER,

Plaintiff,

69 CIV. 3312

-against-

RULE 9(f)
AFFIDAVIT

HARRIS UPHAM & CO., INCORPORATED,

Defendant.
-----x

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

I, ALAN HARRIS, being duly sworn, deposes and says:

That he is a member of the firm of LIVINGSTON, LIVINGSTON
& HARRIS, the attorneys for the plaintiff.

Pursuant to Rule 9(f) of the General Rules of this Court, the
undersigned certifies that he has conferred with counsel for the defend-
ant in an effort in good faith to resolve by agreement the issues raised
by this motion without the intervention of the Court and has been unable
to reach such an agreement.

By correspondence and at a conference of more than 2 1/2 hours
in duration at the office of counsel for the defendant on May 6, 1970, the
undersigned pointed out each of the defects and deficiencies in the form

PLAINTIFF'S RULE 9(f) AFFIDAVIT SWORN TO AUGUST 12, 1970

and substance of the answers contained in both sets of Answers to Interrogatories. The various theories of the plaintiff's causes of action, and the facts which had already been elicited from the defendant, were reviewed so as to demonstrate to defendant's counsel why information was relevant and essential to plaintiff or why plaintiff was entitled thereto.

Counsel for the defendant stated that additional investigations and checking were being done as noted in the Answers and that further investigations would be done in order to supply missing information and that he would reconsider other answers. On several points he maintained that the form was sufficiently correct and that the defendant refused to furnish other information which it felt would be burdensome to obtain or in its opinion was irrelevant or inapplicable.

Since May 6, 1970, the undersigned has received no further information or communication from counsel for the defendant, although the oral deposition of the plaintiff by said counsel for the defendant has been concluded in the intervening period.

/s/ I. Alan Harris

I. ALAN HARRIS

Sworn to before me this
12th day of August, 1970.

/s/ Jay A. Wallman

JAY A. WALLMAN
Notary Public, State of New York
No. 03-9514625
Qualified in Bronx County
Commission Expires March 30, 1972

PLAINTIFF'S AFFIRMATION DATED NOVEMBER 2, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HAROLD FISHER,

Plaintiff,

69 Civ. 3312

-against-

A F F I R M A T I O N

HARRIS, UPHAM & CO. INCORPORATED,

Defendant.
-----X

STATE OF NEW YORK)
 : SS : -
COUNTY OF NEW YORK)

I. ALAN HARRIS, the undersigned, an attorney admitted to practice in the State of New York, and a member of the firm of LIVINGSTON, LIVINGSTON & HARRIS, the attorneys of record for the plaintiff in the within action, affirms that the following statements are true under the penalty of perjury.

1. This affirmation is submitted in support of the Counter-Order proposed by the plaintiff and noticed for settlement on November 3, 1972, and in opposition to the Order proposed by the defendant.

2. Plaintiff objects to defendant's proposed order because the plaintiff is not willing and able to pursue proceedings further before the Special Master. Plaintiff has incurred expenses far in excess of \$10,000

PLAINTIFF'S AFFIRMATION DATED NOVEMBER 2, 1972

in Special Master's fees, bills for transcripts, attorney's fees, and miscellaneous other items, since this matter was referred to the Special Master. It is an outrage that complete discovery has not been completed nor compelled in this matter as yet. This action seeks a recovery of \$33,000 paid by the plaintiff to the defendant, and perhaps an additional \$17,000 for lost profits. There are logical and practical limits to the amount that a party can be compelled to pay in seeking redress of a wrong. To exceed such limits, in effect, deprives a litigant of his day in court.

3. Such a point has been reached in this action. Plaintiff must now inform the Court, as the Special Master was heretofore informed, that he has been ground down and harrassed by defendant's persistent refusal to co-operate in orderly discovery, to the point that he cannot and will not be able to go further. Accordingly, plaintiff must now seek the termination of the stipulation which was a basis for this Court's order of February 18, 1972, appointing the Special Master.

4. During the proceedings before the Special Master, plaintiff's attorney was directed to file a memorandum respecting defendant's deficient document production. Thereafter, again pursuant to direction from the Special Master, a second such memorandum was filed on June 30, 1972. Copies of these Memoranda (in inverse order) are attached hereto as Exhibit "A". Defendant's answering memorandum is attached hereto

PLAINTIFF'S AFFIRMATION DATED NOVEMBER 2, 1972

as Exhibit "B". Thereafter, in further hearings before the Special Master, defendant, while admitting that it had sources of documents which it had not examined pursuant to the Rule 34 request (originally served in February 1971), finally refused unequivocally to do so. In addition, defendant maintained that further search of its files for documents was impossible because its staff is inadequate and incompetent to do the task intelligently - and to illustrate this, defendant's attorney explained some files had been searched on three separate occasions and that new documents had been found each time. Of course, a serious and competent search the first time would have removed this problem.

5. As a consequence of these developments, plaintiff, with leave of the Special Master, filed another memorandum, supplementing the materials contained in Exhibit "A" hereof. A copy of the said supplemental memorandum is attached hereto as Exhibit "C".

6. Exhibits "A", "B" and "C" constitute the written record, which, with oral argument, led to the Special Master's decision of September 22, 1972, which has been filed herein. It must be observed that said decision is an interim decision. The said decision includes a finding that the documents plaintiff seeks are relevant and discoverable and that production has been piecemeal (pp. 5-6). Plaintiff's only quarrel with the Special Master's decision is the apparent proposal to engage in a piecemeal solution which contemplates the possible elimination of

PLAINTIFF'S AFFIRMATION DATED NOVEMBER 2, 1972

discovery rights which are fundamental to plaintiff's trial preparation and which were granted, on consent, in Judge Murray Gurfein's order of September 17, 1971. We are much too far downstream in this litigation for this fundamental change in the ground rules and, at any rate, the resources are not available for further piecemeal discovery.

7. It is respectfully submitted that the decision of the Special Master is a temporary decision, and is not responsive to the application of the plaintiff as set forth in his aforesaid memoranda.

8. Defendant's Proposed Order is further unacceptable to plaintiff because its terms necessarily alter the terms of the prior order of Hon. Murray Gurfein of this Court, entered on consent of all parties on September 17, 1971, which directed the production of documents sought in a Request pursuant to Rule 34 F.R.C.P. The said order of Judge Gurfein is now the law of this case and it represents a most fundamental understanding in reliance upon which plaintiff conducted all of his discovery to date. Defendant should not now be permitted to renege on the agreed provisions of Judge Gurfein's order at this late stage in the proceedings.

9. It is respectfully submitted that plaintiff's Proposed Counter-Order should be signed by this Court whereby all further proceedings before the Special Master be deemed terminated, and further order that the Special Master be required to prepare and file a final report with

PLAINTIFF'S AFFIRMATION DATED NOVEMBER 2, 1972

recommendations responsive to the plaintiff's application.

Dated: November 2, 1972.

/s/ I. Alan Harris

I. ALAN HARRIS

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
OF JANUARY 11, 1972

* * *

McCarthy

31

1
2 Bartep, I'm not interested.

3 Page 13 towards the bottom of the page it's not
4 distinct. Will you please do the same thing?

5 MR. MC ALLISTER: Yes. I understand that to be
6 January 21 as the settlement date.

7 THE WITNESS: There's a trade date January 21,
8 settlement date January 28.

9 MR. MC ALLISTER: On page 12 where I said value
10 date of January 9, 1969, I will have to correct that.
11 I understood all these dates written in would be
12 settlement dates, but, apparently, I haven't been
13 accurate.

14 MR. FOLEY: Will you check those dates?

15 MR. MC ALLISTER: Yes. I will give you the trade
16 date and the settlement date for each of the 13 pages,
17 if they are not there.

18 MR. FOLEY: Actually, the exhibit consists of 14
19 pages, because there is a page 11A.

20 Q Mr. McCarthy, in the process of preparing or
21 gathering these documents, were you present at the time that
22 this tag, which is put --

23 MR. MC ALLISTER: I did that. That was done in
24 my office. The segregation was done in my office as
25 well.

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS MCCARTHY
OF JANUARY 11, 1972

McCarthy

32

1
2 MR. FOLEY: Did you have any reference then to
3 the request for documents which we had served?

4 MR. MC ALLISTER: Only insofar as I instructed
5 him to produce documents that would comply with the
6 Rule 34 request. We had a conference, and we discussed
7 what records of Harris, Upham would comply with
8 Rule 34 request. Pursuant to that, Mr. McCarthy
9 generated this material.

10 MR. FOLEY: For the record, Item 1 of the request
11 asks for blotter entries which contain itemized daily
12 records up to August 31, 1969 of all trades, both
13 purchases and sales of Bartep Industries, in which
14 Harris, Upham acted as a principal or agent, and
15 which would show the account for which the transaction
16 was effected, the number of shares, unit and sale
17 price, if any, or name or other designation of the
18 person from whom purchased or received or to whom sold
19 or delivered.

20 Q I would ask you, do these documents contained
21 in this folder which is marked as Exhibit 1 constitute all
22 of the records of Harris, Upham in response to that; do they
23 constitute the blotters or other records of original entry
24 which I just described?

25 A I think there should be more than that. It only

SCHON-GREWER

1 BECKMAN ST. NEW YORK N.Y. 10038 BARCLAY 7-8733 - BARCLAY 7-9398

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
OF JANUARY 11, 1972

1 McCarthy 33

2 goes up to 1/21 trade date, which is the last that you have.
3 I believe there are trades later than that.

4 Q Is this a blotter entry?

5 MR. MC ALLISTER: Are you familiar with the term
6 blotter entry?

7 A That's what I was going to ask. Exactly what do
8 you mean by blotter?

9 Q A record of original entry which shows itemized
10 daily records up to August 31, 1969 of these transactions in
11 which Harris, Upham acted as a principal or agent, and which
12 would show the account number for which each transaction was
13 effected, the number of shares, the unit and aggregate
14 purchase or sales price, the name or other designation of the
15 person from whom purchaser received or to whom sold or
16 delivered.

17 MR. MC ALLISTER: Let me say this, Mr. Foley.
18 You have, on the record, a description of exactly
19 how this information is maintained at Harris, Upham,
20 and how it gets from the OTC Department, as in this
21 particular case, into its records. Now, I don't believe
22 anybody can say that this document is anything other
23 than the document of original entry, and I am speaking
24 of Plaintiff's Exhibit 1.

25 MR. FOLEY: If he knows he can say so.

SCHONFELDER

1 BELKIN ST. NEW YORK N.Y. 10038 BARCLAY 7-8723 - BARCLAY 7-9398

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
OF JANUARY 11, 1972

McCarthy

34

1
2 MR. MC ALLISTER: I think you are using a word
3 of art, to be honest with you.

4 MR. FOLEY: I don't intend to.

5 MR. MC ALLISTER: I mean, I don't see how you
6 can call any document that we have described here
7 today a document, as I understand it, of original entry,
8 in the sense that a man sits down and enters into a
9 general ledger book, item by item, the business done
10 that day. These items are put into a computer, and
11 there are four or five different runs that can come out
12 of that computer, based on the sole one keypunch.

13 Q Are you familiar with SEC rules with respect to
14 the maintenance of records?

15 A I, personally, no, sir, I am not.

16 Q I would like to show you a rule, not for the
17 purpose of asking you anything except this. Would you know
18 what the procedures are that Harris, Upham employes to comply
19 with SEC Rule 17a-3(a)(1)?

20 MR. MC ALLISTER: I object to the question as being
21 outside his realm. He already told you he is not
22 familiar with SEC rules. He described for you the
23 procedure followed by Harris, Upham to memorialize any
24 transaction that takes place, including the Bartep
25 transaction.

SCHON-GREWER

1 DECKMAN ST. NEW YORK, N. Y. 10038. BARCLAY 7-8733 - BARCLAY 7-9398
STENOGRAPH AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS MCCARTHY
OF JANUARY 11, 1972

McCarthy

35

MR. FOLEY: I am asking him does he know what the procedures are that are employed by the company to insure compliance with this particular --

MR. MC ALLISTER: He is not a compliance man.

MR. FOLEY: If he doesn't know, he can say he doesn't know.

MR. MC ALLISTER: I'm not going to let him answer, because he's not a compliance man, and he told you he's not familiar with the SEC rules and regulations. I don't know what this document is. National Association of Security Dealers.

MR. FOLEY: Manual. It is page 4021 of the manual, and it purports to be, and to my knowledge is, the Securities and Exchange Commission rules with respect to the keeping and preservation of records. I am not asking him to give any expert testimony on what these rules are. I am asking him does he know, and if he does not he can say so, what steps are taken by the company to comply with the rules. If he does not know, he does not know. It's as simple as that.

MR. MC ALLISTER: Do you know?

THE WITNESS: No, I don't know.

Q Do you know who would know?

RONALD BREWSTER

1 DECKMAN ST. NEW YORK, N.Y. 10014 TEL: 7-9733 -- DALLAY 7-9399
STENOGRAPHY AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
OF JANUARY 11, 1972

1

McCarthy

36

2

A Mr. Joseph Dweck.

3

4

5

6

Q In the course of your reviewing records of Harris, Upham, did you discover any transactions, that you can recall, at this time, in Bartep Industries after the trade date January 21, 1969?

7

8

A I think there was. I thought there was more information than that.

9

10

11

Q Was it your understanding when you were working on the collection of these documents that you were going to get them up to a later date than January?

12

A Up to August.

13

Q You understood it was up to August?

14

A Yes, August, 1969.

15

16

MR. MC ALLISTER: You understood it was up to August 31, 1969?

17

THE WITNESS: Yes.

18

Q Who did the actual search?

19

20

A Three, four, five or six men might have done it, nobody in specific.

21

22

Q You were instructed as to what to get, and you told them what to get?

23

A Yes.

24

25

MR. MC ALLISTER: Were those instructions in writing or orally?

SCHON-GREWER

121 ELMAN ST. NEW YORK, N.Y. 10036. BARCLAY 7-8733 - BARCLAY 7-9398
STENOGRAPHS AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
OF JANUARY 11, 1972

McCarthy

37

THE WITNESS: In writing.

Q What were the instructions you operated under in that search?

A I don't have them right here in front of me.

Q You had written instructions?

MR. MC ALLISTER: That's correct. It was a written letter from me. Following a meeting I had with Mr. McCarthy we reduced our agreement on what to produce into writing, and then sent it to him, and that, of course, is an attorney's work product.

MR. FOLEY: I now have a second folder. This is a folder which has a tag on it Fisher vs. Harris, Upham Paragraph 1(b) and 3(a) and 4.

Let's mark this folder Plaintiff's Exhibit 2 for identification.

(The above described folder was marked Plaintiff's Exhibit 2 for identification.)

Q Looking at page 1 of these documents, would you tell us what these entries across the page are all about, beginning at the left?

A This is pictures of our stock record daily take-off.

Q Is that what you call this page?

A That's what I would call it.

S C * * * REWER

1 BEEKMAN ST. NEW YORK, N.Y. 100 3. DAY 7-8703 - DAY 7-9308
STENOGRAPH AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
ON JANUARY 14, 1972

* * *

McCarthy

123

1 in either a long or a short position with respect to
2 any particular security, the fact of that error is
3 recorded in this ledger and also the event whereby
4 the error was corrected by a sale rectifying the long
5 or short position.
6

7 A Yes, sir, that is what the error account
8 is for.

9 Q Can you state from this or any other
10 record whether or not at any time during the period
11 from October 1st, 1968 through August 31st, 1969, Harris,
12 Upham held as a principal any shares of Bartep?

13 MR. MC ALLISTER: Do you understand the
14 question?

15 THE WITNESS: Yes.

16 A That record would not show it but the
17 daily stock record take-offs which we reviewed on Bartep
18 would show any entries in trading accounts or any
19 accounts Harris, Upham might have as a principal in
20 stock.

21 Q Have you examined those?

22 A I have.

23 Q Can you tell us whether or not Harris,
24 Upham ever did?

25 A I never saw any records of Harris, Upham

SCHON-GREWER

EXCERPTS FROM DEPOSITION OF WILLIAM FRANCIS THOMAS McCARTHY
ON JANUARY 14, 1972

McCarthy

124

1 acting as a principal in Bartep stock.

2 Q What is the number of the account that
3 Harris, Upham would maintain to signify any file their
4 principal account?
5

6 A I don't know the exact numbers.

7 Q We will leave a blank space in this
8 deposition, and if you will check what that account
9 number is for Harris, Upham transactions as a principal
10 in the computer symbols that they use, and what account
11 number it would be, you can fill in the blank.

12 MR. MC ALLISTER: That will be done.

13 MR. FOLEY: May we have this document
14 marked as Plaintiff's Exhibit 4 for identifi-
15 cation.

16 (Whereupon the document referred to
17 above was marked Plaintiff's Exhibit 4 for
18 identification.)

19 Q Plaintiff's Exhibit 4 is composed of
20 six pages. I note that the earliest date on any of
21 these pages is for the period ending January 31, 1969,
22 and the earliest transaction reflected on these pages
23 occurred on January 20, 1969.

24 I would like to ask whether or not there
25 are any for the period prior to that?

S * * * BREWER

1 BECKMAN ST., NEW YORK

18 BARCLAY 7-8733 - BARCLAY 7-9398

EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

* * *

Dugan

118

1
2 are referring to?

3 THE WITNESS: No.

4 MR. McALLISTER: Also in Plaintiff's Exhibit 1
5 is another document which I understand has been
6 identified as a P and S buy sheet. Is that the
7 document you are shown?

8 THE WITNESS: No.

9 MR. McALLISTER: I show you a third document,
10 which is also produced under Plaintiff's Exhibit 1,
11 I believe, and was identified as a daily take-off.

12 THE WITNESS: No.

13 Q Did you ever have occasion where you located
14 errors in the practice of this comparison work?

15 A Yes, sir.

16 Q What did you do about them?

17 A Corrected them.

18 Q Was there a typical type of error?

19 MR. Mc ALLISTER: I object to the form of the
20 question. I don't know what you mean.

21 THE SPECIAL MASTER: I will sustain that.
22 If you are inquiring about the 700, why don't you
23 get to it.

24 Q Do you know whether or not a discrepancy of
25 700 shares was ever found in comparisons relative to Mr.

SCHON-CREWER

1 BECKMAN ST., NEW YORK N.Y. 10038. BARCLAY 7 8733 - BARCLAY 7.9398

EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

Dugan

119

1
2 Fisher's account?

3 MR. McALLISTER: I will object to the question.
4 We have admitted that there was a 700 share error.
5 It was not discovered by Harris Upham at any time,
6 until we answered the Interrogatories, at which point
7 we did discover it.

8 THE SPECIAL MASTER: I will allow the question.

9 A No.

10 Q In the practice of comparisons, do you ever make
11 any comparisons to determine whether or not your
12 confirmations are correct?

13 MR. McALLISTER: I will object to the form of
14 the question. We are getting away from the 700 shares
15 now.

16 THE SPECIAL MASTER: I will sustain the objection.

17 Q Do you know whether or not the information
18 contained on confirmations is part of the raw material from
19 which this comparison runoff is composed?

20 MR. McALLISTER: I will object to the form of
21 the question. I think it could be better phrased.
22 I don't really understand it.

23 THE SPECIAL MASTER: If the witness understands
24 it, he may answer.

25 A I think I understand the question but again, I

SCH * * * EWER

EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

* * *

Dugan

125

1
2 because he had an interruption in his work, and he
3 wanted to know --

4 MR. McALLISTER: That was Mr. Foley's testimony.
5 If you read the testimony or hear it you will
6 understand that the man got up and went to another
7 part of the Harris, Upham office to look at the run,
8 another run.

9 THE SPECIAL MASTER: Perhaps he better testify
10 again.

11 Q Why would a man go and look at other runs?
12 Are the out of town runs checked by this man?

13 MR. McALLISTER: By a man.

14 Q The man who, presumably, took this walk that
15 we heard about.

16 A He should.

17 Q I would like to pursue that. Do I understand
18 then that when you use the word "should", you are indicating
19 there is a procedure which should be followed?

20 A Yes.

21 Q What is that procedure with respect to the out
22 of town runs?

23 A Go out and check the daily P and S run.

24 Q In the case of a buy from the Miami broker of
25 100 shares, somebody should have gone out and checked that one?

SCHON-GREWER

1 BEERMAN ST., NEW YORK 10036 LAFAY 7-7733 - LAFAY 7-9398
STENOTYPE AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

Dugan

126

1
2 A Yes.

3 Q Now, the fact is that we have established, in
4 the normal course of events, with the preparation of the
5 I.B.M. run, the way it is prepared, it would have reflected
6 in the transaction with Schenin, which appears in Exhibit
7 14J as an 800 share transaction, whereas here it would have,
8 on these other basic documents, that that run was to be
9 compared with -- was to be shown as a 100 share transaction.
10 Is the fact that this discrepancy was not discovered
11 explainable to you? Can you tell us how no notation was ever
12 made of that?

13 MR. MCALLISTER: I will object to the form of
14 the question. This is an area that we have admitted
15 to, that there was a mistake.

16 THE SPECIAL MASTER: I will let him answer
17 whatever knowledge he had.

18 A The only knowledge that I could have, in
19 reviewing something three years ago, I don't know if we had
20 two people or one person checking, I don't know who was sick,
21 who was not sick. It certainly appears that somebody did
22 not check it.

23 Q Something did not happen which, in the normal
24 course of events, you would expect would happen?

25 A Right.

SCH * * * EWER

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EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

Dugan

139

1 no other place to get the securities?

2 MR. McALLISTER: During what period?

3 MR. FOLEY: The last four year period.

4 A Well, you're sort of testing my memory. I
5 could remember there was a firm in Brooklyn who we had
6 trouble with through the back office, and we were told not to
7 do business with them.

8 Q Was it Wesco?

9 A No. You would have to test me on this one, this
10 is three years ago.

11 Q Do you recall any difficulties in transactions
12 with Wesco?

13 MR. McALLISTER: I'll object to the form of the
14 question. I don't know what it has to do with this
15 suit.

16 A I never heard of the firm Wesco.

17 THE SPECIAL MASTER: I will allow the question.
18 Repeat the question, so the witness understands it.

19 (The question was read by the reporter.)

20 A I never heard of Wesco.

21 Q Do you ever get involved in trading situations
22 where you receive instructions from Mr. Smythe's end of
23 the firm to make an execution on a buy in?

24 A Yes.

25 * * *

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EXCERPTS FROM DEPOSITION OF DONALD DUGAN ON MARCH 14, 1972

Dugan

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1
2 Q Do you have anything to do with the decisions
3 with respect to whether a buy in shall be made or do you
4 simply receive instructions to go ahead and execute the
5 trade?

6 A We receive instructions to execute the trade.

7 Q Are you involved in any way in keeping track of
8 trades that have been made for purposes of seeing if there
9 is a fail or if delivery is made in time?

10 A No.

11 Q Did Harris, Upham ever buy any Bartep shares
12 because of the failure on the part of --

13 A I wouldn't even begin to answer that. I have no
14 idea.

15 MR. FOLEY: Mr. McAllister, you made a statement,
16 on the record, a few minutes ago, indicating that he
17 had completed his production of documents with respect
18 to transactions in Bartep.

19 To clear the record on that, is it the
20 representation now of the defendant that production
21 is now complete on documents respecting executions,
22 transactions involving Bartep securities, up to the
23 period the end of August, 1969?

24 MR. McALLISTER: You are excluding deliveries?

25 MR. FOLEY: I'm only talking about executions.

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STENOGRAPHER AND SHREVEPORT, LOUISIANA

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 16, 1972

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* * *

2

2

A R T H U R J. O T T E N, having been first

3

duly sworn, testified as follows:

4

EXAMINATION BY MR. FOLEY:

5

Q Would you state your name and address?

6

A Arthur J. Otten -- O-t-t-e-n -- 6600 Ken-

7

nedey Blvd East, West New York, New Jersey..

8

Q Are you employed by the Defendant,

9

Harris, Upham?

10

A I am.

11

Q At which office?

12

A 120 Broadway, New York City.

13

Q What is your position there?

14

A Vice President of Operations, cage opera-

15

tions.

16

Q Would you describe what you mean by opera-

17

tions, is it a department or something else?

18

A Yes, it is the cashiering department of

19

the firm which handles the receipt and delivery of all

20

securities bought and sold, disbursement of checks to

21

customers, checks received from customers, disbursing

22

of dividends and the daily balance of the specific day's

23

work.

24

Q How long have you been employed by the

25

company?

SCH * * * EWER

* * *

Otten

6

1 wire system, Telex system, and the order is routed to
2 the market to which it is supposed to be entered, New
3 York Stock Exchange for listed securities and over-the-
4 counter for unlisted securities. In an over-the-counter
5 stock the market is sought by us from those brokers
6 making a market for the best price available to the
7 customer. Upon execution the branch office is notified
8 at what price it was executed.
9

10 Q May I interrupt? Is your function in the
11 company involved in the transaction yet?

12 A No. Upon execution the branch office is
13 notified of the confirmation of the order and execution.
14 From there the order, I should have said before, is
15 entered on a multi-part form, one part used for the con-
16 firmation of the branch office.

17 Q Is there a name for that form?

18 A Just a Telex wire form, one part used for
19 the confirmation of the order, one part kept in the
20 over-the-counter department or whatever department
21 executed them, another section to be processed by our
22 IBM computer department in computation of the commission
23 and money involved in the trade.

24 In that department the orders are given
25 to clerks and they are matched up with IBM cards in tubs,

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 16, 1972

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alphabetically filed, on which the name of the stock is pre-punched on the card, General Motors, and so forth. The card is then left to travel with the order to the key punch operator who inserts the amount of shares bought or sold and the price, the unit price. It is verified and then all cards at the end of the day are fed into a computer for the actual figuration of the transaction, the first money and the commission and the total amount of the purchase or the net proceeds of the sale.

Q Do you at that point include anything in your computer business to show a trade date and settlement date?

A Yes, that is all punched in at the time, the trade date and settlement date, the customer's account number is also included.

Q May I further interrupt you to ask you about this card. This card which is created at that time is the card upon which all of the various IBM functions are based?

A Yes, this is the source in-put.

Q A variety of different IBM print-outs occur at different times as I understand it, but this is the card from which all of it is based?

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 16, 1972

Otten

8

A All of it is derived, yes. At the end of the day as all of the transactions occurring that day have been run through our computer, the result of these cards produce confirmation to the customer, a P & S daily listing of all transactions effected on that day, a P & S buy and a P & S sell blotter for use in the company, comparison tickets to confirm the trade with the broker on the other side, an over-the-counter listing of all securities bought and sold that day and in seven days hence the production of our stock record take-off for the balancing of the day's work by security.

Q This last one I assume is for balancing on the settlement date?

A Right. The day after the trade date the various items just mentioned are distributed to the various departments for their processing to get ready for settlement date.

The P & S department retains the P & S buy and sell blotters and they compare the trade with the broker on the other side. Our comparison goes out to the broker and his comparison comes in to us for stamping and confirmation.

Q Does the card that you describe have the selling broker's name?

SCt * * * REWER

* * *

Otten

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2 Q The actual physical document that is mailed
3 to this broker, the comparison ticket?

4 A It is handwritten on.

5 Q Do you know is Lockwood a New York broker?

6 A I wouldn't know offhand.

7 Q How about I. J. Schenin & Co.?

8 A I wouldn't know his location.

9 Q We have a white copy, a green copy and a
10 yellow copy. Isn't there a fourth copy of that Telex?

11 A Yes, there is a pink copy.

12 Q What is that for?

13 A That is used to confirm the trade back to
14 the branch office upon execution.

15 Q At the Harris, Upham main office is there
16 one particular location in the company which is used
17 for the Telex operation sending messages in and out?

18 A Yes, there is.

19 Q Are you familiar with the Telex operation?

20 A Not fully.

21 Q When a Telex message is sent on a Harris,
22 Upham machine is a copy made or maintained with the
23 sending operator?

24 A Yes, sir.

25 Q So the machine transmits a message to

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2 wherever you are sending it and keeps a copy which is
3 being made simultaneously and the person typing on the
4 machine can see what they are writing and know what they
5 are sending?

6 A Yes.

7 Q What is done with those copies that are
8 kept by the sending office?

9 A They are stored in a warehouse for a
10 certain period of time.

11 Q Do you know whether similar copies are
12 maintained by the branch offices when they send Telexes
13 to Harris, Upham, copies of their messages?

14 A I couldn't answer that.

15 Q Do you know how long the copies are kept?

16 A I do not know how long. I would say
17 indefinitely.

18 Q How about Telexes that are received, are
19 they stored or kept for some period of time?

20 A Yes, sir.

21 Q That would include the order Telexes that
22 you have described that come in in four parts?

23 A Any message at all received on the machine
24 would be kept, whether it has to do with an order or not.

25 Q How long is it to be kept?

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Otten

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2 A It would be indefinitely, I couldn't say
3 any specific time.

4 Q Is there any procedure for checking the
5 accuracy of Telex messages received or sent?

6 A Specific checking for the accuracy?

7 Q Yes.

8 A No, it would only be found out upon a
9 reading of the message.

10 Q Do you know in what manner or under what
11 system of filing these copies of Telex messages are
12 maintained?

13 A No, I do not know in what order they would
14 be kept.

15 Q Do you know if they are segregated accord-
16 ing to the stock that is mentioned or according to the
17 customer account number that is involved or are they
18 kept in chronological order?

19 A We are talking about orders now?

20 Q I am talking about Telex copies, where the
21 machine makes the simultaneous copy which the operator
22 of the machine has.

23 A You mean in the order of sequence of
24 transmission?

25 Q Is there any index or other listing main-

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1
2 tained to show where you could go into these copies to
3 find a particular Telex if you needed it, apart from
4 just a random search?

5 A No, it would have to be searched.

6 Q If a Telex is sent from the Harris, Upham
7 main office to a particular branch and the copy sent to
8 that branch happens to be lost, is it true then that a
9 copy of the same message could be obtained by searching
10 the records of copies maintained by the sending office?

11 A Yes, sir.

12 MR. FOLEY: Mr. McAllister, I would like
13 to ask you one question which I think would be
14 relevant at this point. Can you state whether
15 or not any effort was made to examine copies to
16 ascertain whether the originals with which you were
17 furnished both respecting the main office and
18 branch offices was a complete production?

19 MR. MC ALLISTER: No. I would deem such
20 a search oppressive, to be honest with you.

21 Q Is there any method for checking Telexes
22 to ascertain their accuracy?

23 MR. MC ALLISTER: Asked and answered.

24 (Brief recess taken.)

25 Q Mr. Otten, you were testifying just before

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 16, 1972

Otten

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1 we took the break about the fact that Telexes are kept
2 or stored after use. Are all four copies of this order
3 Telex in multiple form that you just testified to kept?
4

5 A Yes.

6 Q Therefore, if any particular copy is
7 missing an appropriate search through other parts of the
8 company could get another copy of the same Telex?

9 A I would assume so, yes.

10 Q Is there any method for checking the com-
11 puter output for errors, and more specifically, if the
12 computer prints erroneously the number of shares involved
13 in the particular transaction on, let us say, the con-
14 firmation, are there any comparisons made which would
15 serve to catch that error and lead to its correction?

16 A I don't understand your question, in the
17 sense a computer erroneously prints.

18 Q Can the computer make an inconsistent
19 print-out, say, with respect to the number of shares
20 involved in a transaction on the confirmation and other
21 print-outs it makes respecting that same transaction?

22 A The computer itself, no. It could only
23 print out on the information that is fed into it.

24 Q In other words, there is a tape and it
25 goes back to the same source and would always print the

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Otten

35

1 same number of shares for that transaction?

2 A If that number of shares was punched on an
3 IBM card it would print what is fed into it.

4 Q Mr. Otten, I would like to show you Plain-
5 tiff's Exhibit 14-P for identification which was marked
6 on the deposition of Mr. Dugan on Tuesday of this week.
7 This is a copy of the exhibit. You will note that this
8 is a copy of a confirmation slip, is that correct?

9 A That's right.

10 Q Reflecting a transaction of 800 shares
11 of Bartep stock.

12 A Yes.

13 Q I would ask you to assume this is true,
14 which in fact it is. There was testimony on Tuesday that
15 this confirmation refers to a transaction which is also
16 reflected in Exhibits 14-J and 14-I, which I would like
17 to show you. In particular, the testimony that was be-
18 fore us, Mr. Otten, was that that confirmation for 800
19 shares refers only to the information on these two
20 exhibits, 14-J and 14-I, that one hundred shares were
21 purchased from Schenin.

22 Have you examined this, Mr. Otten?

23 A Yes.

24 Q Exhibit No. 14-J for identification is the
25

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Otten

37

1 A Yes.

2 Q Is it to be assumed that if this is so they
3 would contain the same information?
4

5 MR. MC ALLISTER: That was asked and
6 answered by Mr. Dugan.

7 THE SPECIAL MASTER: I think he is
8 entitled to an answer from this witness. Can
9 you answer the question, Mr. Otten?

10 THE WITNESS: I would like to have it
11 repeated. I was thinking of a recent question.

12 (Read back.)

13 A Yes.

14 Q What procedures are followed when the
15 IBM card has been created to verify whether or not
16 accurate information has been fed into the IBM system?

17 A On the day of the trade there would be no
18 verification. It should subsequently turn up in com-
19 paring the trade on the Street with the brokers.

20 Q In other words, some form of a confirmation
21 would go out to Sahenin on this one hundred-share trade
22 that is reflected in Exhibit 14-J, is that correct?

23 A Confirmation would be rendered, yes.

24 Q Then would Harris, Upham assume that that
25 confirmation is correct unless they heard to the contrary

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 16, 1972

Otten

38

1 from Schenin?

2 A From Schenin or the customer.

3 Q How would the customer know?

4 A Well, upon receipt of the confirmation he
5 would either say I didn't buy this amount of shares or
6 I didn't sell this amount of shares.

7 Q But if it so happened that the customer
8 had bought more, when you have a house ticket like that
9 that is a partial execution of a total order?

10 A Yes.

11 Q It is not really certain that the customer
12 would know?

13 A No, on a multi-share order he wouldn't
14 know whether or not it was executed.

15 Q You would be able to depend upon the broker
16 to whom a confirmation is sent?

17 A Yes, he should come back.

18 Q You noted the confirmation here indicated
19 800 shares. Seeing that, can you state definitely
20 now that the confirmation which was sent to the selling
21 broker also said 800 shares inasmuch as the computer made
22 both?

23 A Yes, the trade would be reflected on a
24 P & S blotter, the P & S buy blotter and a comparison
25

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Otten

39

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2 made up from it.

3 Q A comparison is made up from what?

4 A Of the trade for 800 shares, this is all
5 manufactured by the computer.

6 Q When you refer to a comparison is made,
7 would you be specific as to what is compared?

8 A What we call a comparison ticket.

9 Q Apart from relying on information then
10 from the selling broker, or a disclaimer by the selling
11 broker that the confirmation he received was accurate,
12 apart from that, no procedures are maintained by
13 Harris, Upham to verify that the information in-put
14 on that punch card was accurate?

15 MR. MC ALLISTER: I will object to that
16 question because I don't think it fair in the
17 light of Mr. Dugan's testimony.

18 MR. FOLEY: I object to that.

19 THE SPECIAL MASTER: Let me hear the
20 question and answer again, please.

21 (The record was read.)

22 THE SPECIAL MASTER: I think he is
23 entitled to ask the question and I will over-
24 rule your objection.

25 A It is an area not under my immediate

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supervision and I wouldn't know what steps are taken to

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verify, other than a comparison.

4

MR. FOLEY: Can you state who is the witness

5

who will be able to give us information on

6

that?

7

MR. MC ALLISTER: Mr. Dugan stated on

8

Tuesday there is a comparison made in his depart-

9

ment, number one, and number two, I believe this

10

comparison is made in the P & S department. Is

11

that the name of it?

12

THE WITNESS: Yes, sir.

13

MR. MC ALLISTER: Can you tell me who the

14

supervisor or head of the department is?

15

THE WITNESS: You are talking about a

16

comparison ticket?

17

MR. MC ALLISTER: No, Mr. Foley is talking

18

about an actual physical comparison between the

19

computer product and the actual order executed.

20

Is that what you are talking about?

21

MR. FOLEY: I am talking about any method

22

of verification. If somebody knows whether or

23

not the computer information is verified in any

24

way.

25

MR. MC ALLISTER: There is a verification

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Otten

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1 that takes place in the P & S department. Is
2 that correct, to the best of your knowledge?

3 THE WITNESS: To the best of my knowledge.

4 MR. MC ALLISTER: But the P & S depart-
5 ment is not under Mr. Otten's direct supervision.

6 MR. FOLEY: I ask under whose supervision
7 it is.

8 MR. MC ALLISTER: That is what I am asking
9 Mr. Otten.

10 THE WITNESS: Mr. Alton Willis.

11 Q Do you know whether any such verification
12 or comparisons are made in any other department?

13 A In relation to a trade?

14 Q In relation to over-the-counter trades,
15 to verify the accuracy of the information.

16 A I wouldn't know.

17 Q We did have some information from you this
18 morning I believe that among the products which are
19 created by this computer is a run-off which is sent to
20 the OTC department of the day's transactions.

21 A That's correct.

22 Q Do you know whether that is compared with
23 anything to verify whether or not the information on
24 there is correct?
25

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Otten

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A It is given to them for a purpose. I would assume some comparison is being made.

Q There are three comparisons supposed to be made, assuming that this last one is made that you testified to, and that would be the one on the OTC run-off. Then you say there is another made in the P & S comparison under the direction of Mr. Alton Willis, is that correct?

A I didn't say it was made under his direction. I said to the best of my ability, if a verification was made it would be made in that department under his supervision.

Q The third verification is the fact that a confirmation is sent to a selling broker?

A That's right.

Q In the normal course of events and in the practice and normal conduct in the industry, is it considered dependable that this broker would inform you if there was an error?

A Yes, I would think so.

Q Even if it was an error in his favor?

A I would think he would notify us, yes.

Q Would you consider him as obliged in duty to do so? I will clarify that, do you know any particular

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43

1
2 rule or regulation that would bind his conduct in that
3 situation?

4 A I would say it is an unwritten rule of
5 gentlemanly behavior.

6 Q Part of the product of the IBM also as I
7 understand it is a print-out which is used to serve as
8 a blotter in the receiving department when shares come
9 in?

10 A That's right.

11 Q When that happens the shares actually
12 received are compared in some way in the contents of
13 that blotter to verify the correct number arrived, is
14 that true?

15 A That's right.

16 Q That blotter is also a computer product?

17 A Yes, sir.

18 Q In this instance, inasmuch as the confirma-
19 tion over here showed 800 shares, that blotter should have
20 shown 800 shares?

21 A It should have.

22 Q If less than 800 shares came in what would
23 happen in the normal procedure?

24 A Well, we would assume that the delivering
25 broker is making a partial delivery.

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Q Was any notation made of it so as to watch and see if the rest is going to come in?

4

5

A The remaining portion would become a fail to receive in the hopes that it would be coming in.

6

7

8

9

10

11

Q Is it correct to say then that in 1968 or prior to the rules of the NASD and the Exchange which you described earlier for following up on fails, prior to the issuance of those rules a fail such as this, which would apparently be a fail for 700 shares, would it not --

12

A That's right.

13

14

15

Q -- a fail such as that then would continue indefinitely unresolved unless the customer contacted his registered rep and asked for his remaining 700 shares?

16

A In this case, yes.

17

18

19

20

Q Inasmuch as your IBM records indicate here that 800 shares were involved in this transaction the customer actually received a confirmation for 800 shares, had he not?

21

A He did receive a confirmation.

22

23

24

Q He wouldn't know about this 700-share fail unless he was also going to actually receive physical delivery of the securities?

25

A I don't understand.

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2 Q Is there any way to notify a customer, in
3 a case where he is not getting physical delivery of the
4 certificates, of the extent to which delivery has been
5 made on his order, the order which was executed for him?

6 MR. MC ALLISTER: Do you understand the
7 question?

8 THE WITNESS: No.

9 Q Let's put it this way. The customer got a
10 confirmation here that an 800-share transaction had been
11 executed for him. Your receiving department has a blotter
12 which is sitting there waiting for 800 shares to come
13 in. When 100 come in that is a partial delivery as far
14 as the records in that blotter show?

15 A Yes.

16 Q As far as the customer's confirmation?

17 A Yes.

18 Q Is there any way for notifying the customer,
19 or is it the practice to do so, that a partial delivery
20 on your 800 shares has been received and 700 to come?

21 A There would be no practice to so inform
22 the customer.

23 Q If the customer had not placed his order
24 in such a way as to get actual physical delivery of the
25 shares, under the circumstances can you tell us any way

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1
2 the customer would know enough to ask his registered rep
3 to follow up on the fail?

4 A He would inquire as to the delay in his
5 receiving the 800 shares of stock.

6 Q I am assuming for the purpose of that last
7 question there was no instruction to deliver to the
8 customer, assuming he is not to get physical delivery
9 of the shares.

10 A No, there would not be.

11 Q So is there any basis at all for following
12 up on a fail at this time, since presumably the customer
13 wouldn't ask the rep to do it?

14 A A trade where a fail occurs and only a
15 portion of the stock has come in, leaving an open fail
16 in existence --

17 Q And the customer is in no position to ask
18 about it?

19 A The selling broker would notify us that
20 he is trying to deliver us the remaining portion.

21 Q Is it the habit of the selling broker to
22 indicate at the time he makes a delivery to you that this
23 is a partial performance, or something like that?

24 A His delivery bill would give all the perti-
25 nent data of the previous trade.

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Q Would it say on there that there is more to follow or this is a partial delivery or something like that?

A Yes, he would make an alteration on his delivery bill to indicate a partial delivery.

Q What is done to record the fact that only a partial delivery was received? Is there any new entry made anywhere to that effect?

MR. MC ALLISTER: You mean in Harris, Upham records?

MR. FOLEY: Yes.

A Yes, sir.

Q Where is that entry made?

A When the security is failed on, a fail ticket is made up by the IBM department indicating the broker from whom the shares are coming and all pertinent information relative to the trade.

Q If on the delivery date there was only a partial delivery, is a fail ticket made up to reflect the balance as a fail?

A Yes.

Q If there had been no delivery on time and when the partial delivery was received, it was partial satisfaction of an existing fail; would a new fail be

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made up or some notation made on the existing fail ticket to reflect the status?

3

4

A A notation would be on the existing ticket.

5

Q What is done after that to follow up on

6

this fail and to get delivery? Once again, on the basis of the procedure prior to these new rules.

7

8

A I wouldn't know, no procedure other than

9

an inquiry from the customer or a question from the

10

selling broker.

11

Q The documentation that accompanies a delivery

12

you indicated would indicate the details of the trans-

13

action. When the selling broker delivers a partial

14

delivery there would be enough documentation on there to

15

show that was partial, is that correct?

16

A Yes, sir.

17

Q If in fact it was. In this instance here

18

we have been talking about, this 100-share purchase from

19

Schenin, I would assume 100 was bought from Schenin and

20

Schenin had records to indicate a sale of 100 shares.

21

That is a fair assumption, is it not?

22

A Yes.

23

Q It is practically a certainty?

24

A Right.

25

Q At the same time Schenin also received a

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confirmation indicating they owe 800 shares?

A Yes.

Q So in their records there is an inconsistency somewhere?

A Yes.

Q When they deliver do you know what their delivery ticket would show? Would it show a delivery on the basis of their information indicating they owed 100 or would it show they owed 800?

A The information would show in their records that they are delivering 100 shares on 100-share trade.

Q It wouldn't reflect the fact that in a case such as this it was a partial delivery, it would indicate a full delivery?

A Not necessarily, due to the fact that we do not know the manner in which Schenin & Company broke down the 800 shares. We showed it as one item. They may have had more than one seller.

(Discussion off the record.)

Q Assuming this is a 100-share trade and regardless of whether they had it in two 50s or four 25s or one 100 shares, if their delivery is 100 shares then, as I understand your testimony, their documentation accompanying that delivery would be documentation

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A Oh yes, now we do.

3

Q Did you then, in 1968?

4

A No, that was brought about by the NASD

5

and Stock Exchange regulations on mandatory buying.

6

Q What was the name of the section of the

7

company which maintained records of fails at that time?

8

A Stock received and stock delivered.

9

Q Are these the same people who maintained

10

these blotters you are talking about?

11

A Yes, sir.

12

Q In addition to that did they maintain fail

13

tickets at that time?

14

A Oh, yes.

15

Q The same fail tickets are maintained by

16

a separate department now?

17

A No, the fail tickets are maintained by the

18

same department, an overdue fail becomes the responsibility

19

of the buy-in department.

20

Q Apart from just noting it on a fail ticket

21

that a continuing fail exists, is there any other nota-

22

tion made anywhere in the records of the company of this

23

discrepancy between 800 and 100 at this time?

24

MR. MC ALLISTER: On the record, I think,

25

Mr. Foley, Mr. McCarthy described for you the

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1
2 creation of the fail ticket. You are using the
3 words "notation on the fail ticket --"

4 MR. FOLEY: I said any notation in the
5 company's records.

6 MR. MC ALLISTER: Not if you read the
7 question back.

8 THE SPECIAL MASTER: Are you objecting
9 to the question?

10 MR. MC ALLISTER: Yes, there is a mis-
11 assumption in that question.

12 THE SPECIAL MASTER: I will allow him to
13 answer the question. I know what he is driving
14 at.

15 THE WITNESS: Could I hear the question
16 again?

17 (The question was read.)

18 A Yes.

19 Q Where is that done?

20 A An open fail for 700 shares would show on
21 our fail run which gives the detail of all open fails at
22 that time.

23 Q So this fail run now is a new document to
24 me. Can you describe the fail run?

25 A The fail run is up-dated daily to include

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all new fails occurring on a settlement date.

3

4

5

6

Q If the settlement date passes and a partial delivery occurs thereby diminishing the amount of the fail, does that fact find itself reflected in this fail run?

7

A Yes.

8

9

10

11

Q In terms of its physical composition is the fail run maintained on any particular method such as according to broker or according to the particular stock, or can you describe how it is maintained in that respect?

12

13

A It is maintained in alphabetical order by security.

14

15

Q So then on any given day you will be able to tell the fail position of a given stock?

16

A Yes, sir.

17

18

Q Does the fail run indicate the broker from whom due?

19

A Local brokers, yes.

20

21

Q If it is an out-of-town broker it wouldn't reflect that?

22

A The fail ticket would indicate that.

23

Q Not the fail run?

24

A Not the fail run.

25

Q Is there any reason why you make distinction

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2 Q In other words, your card only makes room
3 for certain but not all New York brokers and no out-of-
4 town brokers?

5 A Certain New York brokers and no out-of-town
6 brokers, yes.

7 Q What is it used for, what is done with the
8 fail run once it is made?

9 A It is used in the daily balancing of the
10 fail to receive and fail to deliver. The total money
11 value on that run must agree with our general ledger
12 balance.

13 Q Just the money figure?

14 A The stock position must also agree with
15 our stock record.

16 Q By that are you saying, in other words, that
17 you must have another record in the company somewhere
18 that would reflect the same number of shares of the same
19 stock as being due?

20 A Yes, sir.

21 Q On a day-to-day basis as the fail continues
22 does it re-occur on the run each day?

23 A On every subsequent run if the fail is open
24 it would appear.

25 Q Does it indicate on that run how long that

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fail has been in existence?

3

A Yes.

4

Q Let us say there is a fail on the 29th of

5

October, 1968, arising from the situation we have right

6

here of presumably an error in the computer, which is

7

not called to the attention of the registered rep by the

8

customer. You would have fail runs coming through the

9

following January and February indicating a four or

10

five-month old fail is still wide open?

11

A It is a possibility.

12

Q At no time along the line is anything done

13

independently within the company at that point to take

14

any step to clear up that fail unless the customer insists,

15

if he knows?

16

A We are talking of the period in question?

17

Q Yes.

18

A Due to business conditions at that time,

19

I would say no, no attention is given.

20

Q Would you expand on that? What were the

21

business conditions at that time to which you are re-

22

ferring?

23

A The demands of heavy volume in the Street

24

for one thing. Balancing of the day's work is first and

25

foremost in keeping current in the business transacted.

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2 A On experience with my previous firm, we
3 examined fails anything over twenty days old.

4 Q You mean twenty days in a fail position?

5 A Yes.

6 Q Twenty plus the seven or eight days for
7 delivery?

8 A That's right.

9 Q Can you give us some description of the
10 period of time during which this particularly heavy
11 business burden continued, how far back would you say
12 it started, roughly?

13 A I would say in the spring of '68 into the
14 early fall of '69.

15 Q From the spring of '68 to the early fall
16 of '69 do you know whether or not anything was done to
17 check long outstanding fails other than the procedure you
18 just described?

19 A I do not know, I was not involved in the
20 area at that time as I am now.

21 Q If there was anything done, a discrepancy
22 such as this 700 shares should have been revealed under
23 those circumstances?

24 A If there were controls in effect it would
25 have appeared.

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2

3

Q These are controls which even prior to the spring of '68 were normal controls in the industry?

4

A That's right.

5

6

7

Q Since the new rules of NASD and the Exchange went into effect I believe you testified that now there is a mandatory buy-in?

8

A Yes.

9

10

Q At what point does that occur, how many days of fail?

11

A Thirty days on the New York Stock Exchange.

12

13

14

15

Q Was there ever a practice prior to these rules of reaching a point where the procedure of the company would be to buy-in because of an outstanding fail for a certain period of time?

16

17

18

A Dictated by the volume of business at that time, if it was light, the company would initiate an intent-to-buy-into the selling broker.

19

20

21

Q The so-called intent-to-buy-in is a communication sent to the other broker saying if you don't deliver by "X" date we will buy you in?

22

A That's right.

23

24

25

Q Would the period of time which would be allowed to elapse for the continuation of a fail until such an intent-to-buy-in notice was sent out, would that

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2 is in relation to another 100-share certificate. No cus-
3 tomer would come into our vault and say, "I have 500
4 shares on deposit here with Harris, Upham," and count
5 out five 100-share certificates and say, "These are mine."

6 Q Are all of the shares that are gathered
7 together in this system you have just described all in
8 Harris, Upham's name?

9 A Segregation requirements state that stock
10 in segregation cannot be in the customer's name, it
11 must be in his broker's nominee's name or in the name of
12 other brokers, which are Street certificates.

13 Q They may just not be Harris, Upham. You
14 could have a lot of Merrill Lynch and others?

15 A Yes, as long as they are Street certificates.

16 Q Now, to get back to where we were going,
17 an inquiry comes in from a registered rep, the customer
18 wants to know where his delivery is. The cashier you say
19 checks the stock position record, is that right?

20 A Yes.

21 Q What does that show?

22 A This would show if there is an open fail to
23 receive, it would appear on there, and if so, he would
24 go to the fail records to see who owes us the stock and
25 initiate an intent to buy-in.

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Q So at the time of the inquiry, that's it.

3

If there is a fail open still -- and this is now back in '68 and '69.

4

5

A Right.

6

Q -- the rule would be if the customer makes

7

a request for his stock, you check your records and if

8

you find it is in a fail position, and -- an intent to

9

buy in is sent out then without further delay?

10

A Yes.

11

Q This was a cut-and-dried practice in the

12

company at that time?

13

A Yes, that's right.

14

Q Were there any rules that you know of out-

15

side of the company's rules and procedures that required

16

that, such as Commission rules or Exchange rules or

17

NASD rules?

18

A The rules of the regulatory body state

19

that a buying broker is entitled to his stock on settle-

20

ment date and can demand it on that day or any time

21

thereafter.

22

Q The question I was asking was whether or

23

not you know of any rules that require the firm to not

24

only demand his stock when this inquiry comes from the

25

customer, but also to initiate a notice of intention

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1
2 to buy-in?

3 A Not making it mandatory?

4 Q No, this is a company rule, not an external
5 rule?

6 A Yes.

7 Q This was the standard practice and the
8 way they dealt with all their customers, this is the way
9 they did business?

10 A Yes.

11 Q Was the speed or frequency with which
12 notices of this type which were made by a customer with
13 respect to his shares affected by the heavy volume of
14 business that prevailed in 1968?

15 A I don't follow the question.

16 Q Did the heavy volume of business in 1968
17 have any affect on the speed with which a buy-in inten-
18 tion notice would be sent out following an inquiry from
19 a customer which revealed a fail?

20 A It would go out forthwith upon the request
21 of the customer, where his stock was at the time.

22 Q With respect to fails, assuming that you
23 have a fail on a certificate and it comes in and the
24 fail is thereby technically cured by reason of delivery
25 of the certificate, if thereafter the certificates are

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put in for transfer and if for any reason whatsoever transfer is rejected by the transfer agent, does this have any affect on the fail records maintained by the company to open a new fail or do anything in the fail department?

A If the shares returned from transfer were returned from the broker they would have a new fail set up.

Q Let's take a new situation where for a customer shares are bought by Harris, Upham. Harris, Upham receives them in the receiving department, they go through to transfer, sent out from transfer to the Registrar and Transfer Company or to some transfer agent who returns the certificates and rejects the transfer.

What in the fail department happens on that occasion?

A The transfer department will note their return from transfer, and where additional documents or requirements are necessary on the certificate itself by the selling broker, the certificates would be returned via the fail to receive department.

Q They would be returned to the selling broker?

A Yes.

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2 Q The certificates would?

3 A Yes.

4 Q I notice that you qualify that answer by
5 saying this is what would be done when additional docu-
6 mentation is required. Are you thinking of such things
7 as removing restrictions?

8 A No, if there is something wrong with the
9 certificate that will affect transfer, a wrong endorsement
10 by the registered holder, not an appropriate guarantee
11 as regulated by the rules for a signature guarantee.

12 Q In other words a technical deficiency?

13 A Yes, anything to do with making a certifi-
14 cate non-negotiable for transfer where, as I said, further
15 correcting by the selling broker was necessary.

16 Q Do I take it, also, this would not include
17 situations where, for instance, there weren't registered
18 shares and there were restrictions of some technical
19 deficiency of that nature?

20 A That, too, would entail return to a broker.

21 Q At that time would they get their money
22 back from the selling broker?

23 A Who gets their money back?

24 Q Harris, Upham.

25 A Yes.

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Q There is a refund of the cash and certifi-

3

cates are sent back to be corrected?

4

A The amount that we paid him upon delivery

5

is returned to us.

6

Q Is there any record made in the fail depart-

7

ment on that occasion? Is a new fail opened?

8

A Yes, sir.

9

Q Does that fail appear on these daily fail

10

run-offs?

11

A It would then appear as a new fail and an

12

open fail on our run.

13

Q When stocks are returned from a transfer

14

agent and if for any reason there is a period of time

15

that elapses between their return to Harris, Upham and

16

return by Harris, Upham to the selling stock broker, is

17

it fair to say under no circumstances could securities

18

such as that be included in this bulk file you testified

19

about?

20

A No, they would not be sent to our box.

21

Q Were there any rules and regulations or

22

any procedures employed regularly by Harris, Upham in

23

late '68 and early '69 with respect to the speed with

24

which when a transfer agent rejects a transfer the

25

securities are returned to the selling broker?

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MR. MC ALLISTER: Do you understand the question.

THE WITNESS: I think I do.

A It would mean that they ought to be returned immediately upon our knowing that there is something wrong with them.

Q Let's follow that up now. When the transfer agent rejects certificates for transfer and returns them to Harris, Upham he returns them to the receiving department?

A Transfer department.

Q They go to the transfer department. Is the transfer department then obliged to notify your department immediately?

A They should make it known immediately that we have trouble on these certificates.

Q In the normal course of business did they do it promptly upon return?

A At this time?

Q Yes.

A I don't know.

Q Do you know whether there were any instances that you can recall at all where, say, the transfer department would get back certificates and not notify

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you right away at that time?

3

A No, I don't know.

4

Q Frankly, with your knowledge of the way

5

the company operates, would you consider it a rather

6

extraordinary thing for that to happen?

7

A Yes, it is, they should act upon it immediate-

8

ly.

9

Q When the securities have been returned to

10

the selling broker because of a rejection by the transfer

11

agent, if these are securities with respect to which

12

inquiries are coming from a customer, is there anything

13

further done then by your department to pursue the fail?

14

Do you send in a buy-in notice right away?

15

A Oh, yes.

16

Q Upon return then of the rejected securities

17

to the selling broker you first of all inform them you

18

want the deficiency made good immediately, I assume, is

19

that true?

20

A We don't inform them of that fact as

21

specified. We would return them telling him the reason

22

for the return. He would either pay us our money for

23

the value of the certificates or if he has good certifi-

24

cates on his premises he may care to exchange them right

25

on the spot, in which case they would come back to us

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and we would cancel our fail to receive, taking in good certificates.

Q You want either money right away or good certificates?

A Yes. The other broker understands this.

Q This is clearly understood?

A Yes, pay us or give us negotiable stock.

Q In the event he does neither do you automatically send out a buy-in intention notice?

A He has to give us our money back or exchange negotiable certificates.

Q If he does give you your money back does that constitute a cancellation of the transaction so far as he is concerned with you?

A No, it becomes a fail to deliver on his side and a fail to receive on our books.

Q He still is obliged then at a later date to come forward with the delivery?

A Yes.

Q With respect to confirmations to the customer, you gave testimony that much of the information on a confirmation is derived from the computer. I would assume that is the information such as the number of shares and things like that?

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objection.

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A I said I didn't know as to the prior question. It would follow through to any prior emergency rules that may have been published, other than the buy-in rule that was on the books at the time in the NASD manual.

8

9

10

11

Q Did I understand your testimony before to indicate that when a buy-in intention notice is sent out, a fail ticket is still maintained?

12

13

14

A That's right.

15

16

17

Q If the selling broker furnishes certificates to cure the fail, what happens to the buy-in notice?

18

19

20

21

A It is automatically cancelled.

22

23

24

25

Q When a buy-in notice is sent out when does it indicate you will make the purchase?

A It is all stipulated on the intent to buy-in, when we send them the notice, that unless delivery is made before a specified time in a specified date, we will buy the securities in for his account.

Q How much time do you generally give him?

A That generally varies. In the case where a customer is concerned we would probably give him until the next day. Where it is an old item, we would expedite

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delivery on his part.

Q During the latter part of 1968 and the early part of 1969, you weren't sending out buy-in notices except in instances where the customer was concerned, isn't that true?

A Yes.

Q Consequently, the general practice at that time was to send a one-day notice?

A Yes, I would say that is a fair assumption.

Q When you send a buy-in notice do you keep a copy of it?

A Yes.

Q What form is the actual notice in?

A It is a printed form approved by the NASD. It is made up in duplicate and both copies go to the selling broker. He keeps one and he stamps the receipt of one for our records.

Q That one is brought back to you?

A Yes.

Q Is it delivered by messenger?

A Yes, by runner, our runner goes out with it and he brings it back.

Q When your runner brings it back what is done with it?

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A At this time we had no buy-in department.

3

It was given to the cashier or receipt clerk.

4

Q Does he keep it?

5

A He is supposed to follow up on it.

6

Q Does he file it in any particular place?

7

A He would keep it before him because execu-

8

tion of it would be imminent; it would be the next day

9

or maybe the day after.

10

Q Let's assume that within the period of time

11

before you actually go ahead with the buy-in the selling

12

broker does deliver shares, what is done with the buy-in

13

notice the cashier has been keeping?

14

A Before the selling broker delivers the

15

shares back to us upon presentation of the buy-in he

16

would so notify us that he intends to deliver. His first

17

step would be to kill the buy-in, to get himself off the

18

buy-in.

19

Q Does he kill the buy-in by merely saying he

20

is going to deliver?

21

A He would have to guarantee delivery the

22

next day.

23

Q What happens physically in the records when

24

he guarantees to deliver within the next day, what is

25

done with the buy-in notice you are keeping, to reflect

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the fact that this guarantee has been received?

A The clerk or department head holding the buy-in would follow up on it the next day to see the stock did come in.

Q If it did what does he do then?

A If it did come in?

Q Yes.

A No action; the fail is cleaned up and the buy-in ignored.

Q You don't throw them out; some record is kept of when the buy-in notice was issued?

A Now they are, yes, at that time I couldn't say what could have happened. It should have been kept with a notation on it delivery was made such and such a day.

Q And some kind of record maintained so you knew a buy-in had been issued and the fail was cured?

A It would probably go in with the day's work.

Q Taking the other alternative, assuming the fail is not cured, then you proceed with the buy-in?

A We would call him up to ask him the reason for it. If it wasn't forth-coming that day we would

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2

execute the buy-in.

3

4

5

6

Q By executing the buy-in then what physically do you do with the buy-in notice you have kept with your other records to show the steps taken in the process of accomplishing the buy-in?

7

8

A The fail ticket would be attached with the buy-in notice.

9

10

Q The cashier has both of these at this time?

11

12

13

A The cashier or the stock receipt clerk. As I said before the receive clerk or the cashier would follow it to the time of buy-in.

14

15

Q Does this go back up to your order department?

16

17

A We would so inform the order department we were executing a buy-in against the selling broker.

18

19

20

21

22

23

24

25

Q In prior testimony I notice when the order department transacts, they have paper work. Is there any paper work in their hand comparable to the order Telex we discussed this morning in testimony which they use when they are executing orders? Do they have any paper work up in the order department when executing a buy-in?

A They would have to be instructed in

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1 writing to buy-in a certain stock.

2 Q Is this some form of an inter-office
3 memo that is sent to them?
4

5 A Not an inter-office memo. It is written
6 on a piece of paper. We use yellow cards.

7 Q Like the so-called house ticket?

8 A No, it is not a house ticket. The
9 instructions from the cage would be on a yellow card
10 to buy in 100 shares of X, Y or Z.

11 Q That card then is sent to the order depart-
12 ment?

13 A Yes.

14 Q They execute the order?

15 A Yes.

16 Q In the meantime does the cashier keep the
17 buy-in notice and the fail ticket?

18 A Yes, because he would have to clean up his
19 fail; he shows the fail being cleaned up. No physical
20 delivery of stock. But he makes a notation we are
21 cleaning up this fail because of a buy-in. He would
22 put it into an account used for the execution of buy-ins.

23 Q Are those records then, that buy-in and the
24 cancelled fail ticket, kept thereafter or are they dis-
25 carded at that point?

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A No, they are kept. May I make a stipula-

3

tion. At this present time they are kept. I cannot

4

vouch for this period. They normally would be in with

5

the day's work. Whether or not that is still available

6

I don't know.

7

Q Who would know?

8

A Mr. Dweck.

9

Q My recollection of your testimony was

10

that in the case where a buy-in notice is sent out and

11

one copy is received back receipted by the selling

12

broker, and the cashier keeps it but the selling broker

13

makes good by delivering new securities, then that buy-

14

in notice is kept as part of the record of that day's

15

work?

16

A Yes.

17

Q That was the practice in 1968?

18

A I would assume so, yes.

19

Q Well, do you know?

20

A Specifically, no.

21

Q Presumably, a buy-in notice having been

22

sent out with respect to that transaction there would

23

always have been a fail ticket before?

24

A Oh, yes.

25

Q When the buy-in is cancelled because of the

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delivery of good securities I assume the old fail ticket and the buy-in notice are kept together?

A No. If the stock is delivered in time before the execution of the buy-in, they are not kept together. The fail would be cleaned up with a notation the stock certificate is delivered on it and probably a line put through the buy-in notice that that stock was delivered against it. Their being attached to each other, I couldn't say.

Q I would like to go back in time a little bit and see how far back in time were you sufficiently personally involved with this procedure so that you can tell us definitely that buy-in notices were kept after the transaction was completed?

A My supervision started in February, 1970.

Q Prior to that what were you doing there?

A I was assigned to the internal auditing staff.

Q You had nothing to do with clearing up fails?

A Only in a small way.

Q Perhaps you would describe the functions of an internal auditing section.

THE SPECIAL MASTER: May I ask a few

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1 to question 11 in the second set of interrogatories,
2 which is 11-A, B, C and D, and the amended answers given
3 in response there to, which refer to some exhibits that
4 were attached to the answers to interrogatories.
5

6 You might just read the questions and
7 answers and then we will go to the exhibits, which is
8 what I want to ask you about.

9 Are these records familiar to you,
10 Mr. Otten, the records shown in Exhibit 8, which is be-
11 fore you now? This appears to be a compilation of
12 figures on a daily basis for the months of February,
13 March, April and May, it doesn't say what year. Can
14 you tell us what it is?

15 A They appear to be the total aggregate of
16 our fails for the period shown.

17 THE SPECIAL MASTER: Mr. Foley referred
18 to Exhibit 8; he was talking to Exhibit 8 as
19 attached to the first amended answers to inter-
20 rogatories, so as not to confuse it with any
21 other exhibits.

22 MR. HARRIS: In the body of this one he
23 has two sets of answers. The word "first"
24 doesn't appear there.

25 MR. FOLEY: These are Defendant's amended

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2

answers to the interrogatories dated March 18,

3

1970, the two sets are pinned together.

4

THE SPECIAL MASTER: Do you agree that

5

this is attached to the Defendant's amended

6

answer to interrogatories dated March 18, 1970?

7

MR. MC ALLISTER: Yes.

8

MR. FOLEY: There is one other problem

9

about Exhibit 8, that there is another Exhibit 8.

10

You identified the last of the correspondence you

11

gave me which immediately preceded this also as

12

Exhibit 8.

13

Q Can you give us some basic description of

14

what all this is? Is it a daily listing of the total

15

dollar amount of we fails and they fails on the books

16

of Harris, Upham?

17

A Yes.

18

Q Taking a look at what appears to be line

19

31 in February column on the extreme left, is that some

20

kind of a total for the month or something like that?

21

There is no 31st day in February. I was wondering if

22

you could explain what that is.

23

A No.

24

Q Let us go over to Exhibit 10 if you please.

25

Perhaps we can get something a little more helpful there.

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Is this the we fails and they fails for October, November
and December of presumably 1968?

3

4

A Yes.

5

6

7

Q Looking at the bottom of the two columns
for October, on line 31, under the we fail position, is
that dollars?

8

A It is 12 million 253.

9

10

Q That indicates that was the total dollar
value of securities you owed to other brokers?

11

A From what I was looking at, yes.

12

13

Q Do you know if what we have here is this
regular record maintained by Harris, Upham?

14

A In its present form as we look at it?

15

Q Yes.

16

17

A I would say it was compiled for a reason.
It is not a standard record.

18

19

20

Q Is there a standard record maintained which
shows the day-to-day dollar volume of the we fails and
they fails?

21

22

A Yes, as I previously testified, on our fail
run.

23

24

Q The fail run should be substantially the
same as this, assuming this is correct?

25

A Yes.

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1 Otten 107

2 MR. MC ALLISTER: For that period of time?

3 THE WITNESS: Yes.

4 Q According to this then at the end of
5 October other brokerage firms were in a fail position
6 to you for \$18,759,010.57, is that correct?

7 A Yes.

8 Q That means purchases had been executed for
9 this amount and the shares had not been delivered to
10 you?

11 A That's right.

12 Q Would it be correct to say that the funds
13 used to make those purchases are in the hands of Harris,
14 Upham waiting for the deliveries?

15 A Yes.

16 Q It appears from glancing at this page that
17 the following month at the end of November, for instance,
18 there was in excess of twenty million dollars?

19 A Yes.

20 THE SPECIAL MASTER: That is twenty million
21 in the they fail account?

22 MR. FOLEY: Yes.

23 Q At the end of December in the they fail
24 account you had over twenty-nine million dollars?

25 A Yes.

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1 Otten 108

2 Q Turning to the next page, Exhibit 11, can
3 you tell us what these are, are they we fails or they
4 fails?

5 A It is they fail, two seventy-five is a
6 they fail.

7 Q Once again it would appear as though
8 throughout January you had fails of twenty-three to
9 thirty million dollars day by day?

10 A Yes.

11 Q Through February they weren't quite as
12 high, they ran over twenty million every day. What this
13 signifies is that on a day-to-day basis throughout this
14 period of time Harris, Upham had a liability on the
15 books for these securities that were not delivered, the
16 dollar amount of securities that were not delivered?

17 A Yes, we owed money against them.

18 Q To whom?

19 A To brokers.

20 Q Are you familiar with the accounting
21 principles involved in calculating the asset ratio of
22 Harris, Upham?

23 A I don't understand what you mean. The
24 capital ratio, you mean?

25 Q Yes.

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1 A I do not partake in that computation.

2 Q Do you know whether or not this liability
3 was included in that computation at that time?

4 MR. MC ALLISTER: If you know.

5 A I do not know. I was not involved in the
6 computation.

7 Q The liability to other brokers that you
8 just discussed, you weren't really liable to them until
9 they delivered?

10 A No.

11 Q Until they did deliver I suppose you should
12 call this a liability to the customers whose money you
13 were holding, right?

14 MR. MC ALLISTER: If you know.

15 Q Put more simply, would you say this, this
16 cash surely wasn't Harris, Upham's?

17 A No, it reflects the payment by the customer
18 for the securities purchased.

19 Q So even though a liability had not been
20 created to the broker inasmuch as he hadn't delivered,
21 yet liability existed to somebody and it could only be
22 to the customer, isn't that true?

23 A May I consult?

24 THE SPECIAL MASTER: Go ahead.

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(Witness conferred with his counsel.)

3

A In response to the question posed, I would

4

say our liability to the customer here is only delivering

5

the shares that he purchased since he has already paid

6

for the stock.

7

Q Do you know where these funds were kept

8

on deposit?

9

A It was reflected in our bank balances.

10

Q Were they mingled with the firm's money?

11

A Accounting throughout the firm.

12

Q Do you know whether or not the firm con-

13

sidered this twenty to thirty million dollar continuing

14

balance here as funds with which they could conduct their

15

business?

16

MR. MC ALLISTER: If you know.

17

A I don't know.

18

Q Do you know whether or not while they

19

were waiting for these fails to be cleared up they

20

segregated this money or paid any interest to anybody

21

for it?

22

A I don't know.

23

Q You have referred earlier to a receiving

24

clerk, that particular position is known to you?

25

A Stock receiving clerk.

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2 MR. FOLEY: And when they went out to
3 transfer.

4 (Discussion off the record.)

5 THE SPECIAL MASTER: In the course of
6 Mr. Otten's deposition, Mr. Foley directed his
7 examination to a Plaintiff's interrogatory No. 9
8 and to an answer to that interrogatory dated the
9 3rd day of October, 1969, signed by a Mr. Trow-
10 bridge of the firm of Gifford, Woody, Carter &
11 Hays, and to an amended answer No. 9, dated
12 October 5, 1970, signed by Mr. Joseph Dweck, a
13 Vice-President and Assistant Treasurer of the
14 Harris, Upham Company. It became clear from the
15 examination that these answers contained certain
16 errors, and after considerable discussion a
17 program was agreed upon as to how these errors
18 in answer No. 9 would be corrected. The program
19 agreed upon is as follows.

20 MR. FOLEY: First of all, the first five
21 certificates referred to at the foot of the first
22 page of answer 9 are going to be examined by the
23 defendant and copies furnished.

24 Secondly, the defendants are going to
25 re-examine their records with respect to the

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1 Otten 132

2 first tabulation given in answer 9 showing
3 brokers from whom received, the dates of receipt
4 and the number of shares received, and to make
5 corrections therein.

6 Thirdly, defendant is going to examine
7 the photocopy of certificate No. 1226, which is
8 listed as the second to last item on the second
9 page of the answer to interrogatory No. 9, and
10 will furnish a copy of that.

11 Finally, defendant will examine its records
12 with respect to the tabulation on the third page
13 of the answer to interrogatory No. 9 and determine
14 which three of the five certificates listed
15 therein were transferred in this transaction.

16 With respect to the tabulations in this
17 response No. 9 the defendants will relate which
18 of the certificates in their first tabulation --
19 namely the tabulation listing the brokers from
20 whom received -- referred to the certificates
21 listed in the second tabulation.

22 THE SPECIAL MASTER: Mr. McAllister, do
23 you want to add anything to that statement to
24 show your understanding and acquiescence?

25 MR. MC ALLISTER: I have made a notation

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of that material which Mr. Foley just dictated into the record. We will comply with that request. And furthermore we will also show the date on which the certificates went into transfer and came out of transfer.

MR. FOLEY: As I understand it you are going to give me the record of these securities right from receipt through transfer, is that it?

MR. MC ALLISTER: And out of transfer, right. That is satisfactory to me.

THE SPECIAL MASTER: We are now suspending Mr. Otten's deposition for today, to be resumed Wednesday morning at 10:00 o'clock. Prior to that time Mr. McAllister has given his assurance that the aforementioned documents will be produced and copies will be furnished to Mr. Foley prior to the deposition.

Sworn to before me this
day of 1972.

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* * *

APPEARANCES (continued):

GIFFORD, WOODY, CARTER & HAYS, ESQS.
Attorneys for Defendant
One Wall Street
New York, New York
by: MICHAEL J. McALLISTER, ESQ.
of Counsel

* * *

ARTHUR J. OTTEN, having been previously
duly sworn, testified further as follows:

THE SPECIAL MASTER: Note on the record
that Mr. Otten is resuming his deposition. He
is reminded he is still under oath.

THE WITNESS: Yes, sir.

EXAMINATION BY MR. FOLEY (continued):

Q Mr. Otten, we ended the last session of
this deposition by an examination of the Defendant's
answer No. 9 to its first amended answers to the inter-
rogatories propounded by Plaintiff on August 13, 1969.

In our discussion we had come to the
conclusion that certain revisions of the information fur-
nished in that response would be in order. I wish to
ask you now if you have prepared any revisions of that
information since then?

A Yes, we have. We have formulated a new
allocation of all certificates pertaining to the trades

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1 Otten 137

2 in question, and have also furnished Xerox copies of the
3 certificates noted as missing in your last session.

4 MR. FOLEY: For the record, I have been
5 furnished with photocopies of the following
6 stock certificates: No. 443-S for 100 shares
7 of Bartep in the name of Howell Sherman.

8 No. 687-S, 100 shares of Bartep in the
9 name of Myron R. Boraks, B-o-r-a-k-s.

10 No. 688-S, 100 shares of Bartep, same name,
11 Boraks.

12 No. 689-S, 100 shares of Bartep in the
13 name of Boraks.

14 No. 690-S, 100 shares, Bartep in the name
15 of Boraks.

16 Finally, we have No. 1226-C for 500 shares
17 of Bartep in the name of Anne -- A-n-n-e --
18 DePasquale -- D-e-P-a-s-q-u-a-l-e.

19 I don't think there is any particular need
20 to mark these at this time in evidence. The
21 occasion may arise but I just want the record to
22 reflect they have at this stage been furnished any-
23 how.

24 Q Mr. Otten, would you be kind enough to
25 explain the contents of schedules A, B and C which you

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1
2 have furnished as new responses to interrogatory No. 9.

3 THE SPECIAL MASTER: Would you like to
4 have those identified?

5 MR. FOLEY: Yes, I think we will mark
6 these either now or as the testimony proceeds.

7 A In connection with schedule "A", this
8 schedule depicts a description of the purchases by settle-
9 ment date, a breakdown of the shares purchased on said
10 dates, and from whom they were purchased and at what
11 price. Also the dates the certificates were received by
12 Harris, Upham from the brokers.

13 Q Are these the shares which your records
14 reflect were purchased in execution of the order of
15 Mr. Fisher which is the subject of this lawsuit?

16 MR. MC ALLISTER: Do you understand the
17 question?

18 (Discussion off the record.)

19 A Yes, they are the certificates noted by us
20 at the time of receipt on documents set up at the time
21 of the purchase to be used on settlement date.

22 Q Were these documents on which you made
23 these notations documents which pertain to the Fisher
24 purchase?

25 A Yes.

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3

Q For the record can you identify which documents those were that you made those notations on?

4

5

6

7

8

9

10

11

A One of the sources of record would be our P & S buy blotter for October 28, 1968, and since the shares noted on that document would be a purchase of 500 shares, all subsequent shares purchased were not delivered on settlement date of October 29, 1968, and therefore fail to receive tickets were originated by our computer department for use in recording receipt when the certificates were actually delivered after that date.

12

13

14

15

MR. FOLEY: I wish to have marked for identification the documents schedule "A", "B" and "C" which this witness furnished. He has just testified as to schedule "A".

16

17

18

19

(Whereupon the schedules "A", "B" and "C" referred to above were marked Plaintiff's Exhibits 31-A, 31-B-1, 31-B-2 and 31-C for identification.)

20

21

22

23

24

25

Q With respect to schedule "A" I note item No. 4 is in the amount of 800 shares and shows 700 shares "H.U. error." Also that item indicates that only 100 shares were received. Is this the 700 share error that we have discussed earlier in your testimony that apparently occurred in the IBM system?

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2

A Yes, sir.

3

Q Going now to schedule "B", would you describe

4

for us what contents are on pages 1 and 2 of schedule

5

"B"?

6

A Schedule "B" depicts the actual certificates

7

delivered to Harris, Upham & Co. in settlement of the

8

purchase for the individual, Harold Fisher, showing

9

the dates the certificates were received, the certificate

10

number received, in whose name the shares were registered

11

and the ultimate disposition of them either into transfer

12

or other normal course.

13

Q I notice in the transfer section here you

14

have date in transfer and date out of transfer. Does

15

that date out of transfer refer to the date on which a

16

transfer was actually accomplished?

17

A It would not necessarily indicate that

18

because the shares originally put into transfer were

19

rejected by the transfer agent.

20

Q That is what I am driving at. Would the

21

date out of transfer be the date of such rejection or

22

would it be the date on which the transfer was accom-

23

plished?

24

A It would not be the date the transfer was

25

accomplished. It would be the date that Harris, Upham

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1 received them back from the transfer agent and processed
2 them out of transfer. In some cases new certificates
3 were received out of transfer on this date and in other
4 cases the original certificate going in was returned
5 because of a specific reason by the transfer agent.

6 Q This schedule here, in the event that a
7 certificate was rejected by the transfer agent, am I
8 correct in saying that presumably upon receipt of the
9 rejected certificate from the transfer agent something
10 further is done with that certificate by Harris, Upham?

11 A Normally, yes.

12 Q This schedule doesn't indicate what that
13 might be?

14 A No, sir.

15 Q Only so far as the first submission to
16 a transfer agent and whatever the response to that was,
17 either a new certificate back reflecting that a transfer
18 was accomplished or rejection of the submitted certifi-
19 cates, that is all this schedule reflects?

20 A Yes, sir.

21 Q Is there any way to tell from this
22 schedule which were rejected?

23 A Not from the schedule itself. We have
24 documentation of these transfers that we can tell from.

25 Q From this schedule is there any way of

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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2

telling at what date any subsequent submissions were

3

made to the transfer agent of certificates which were

4

originally rejected?

5

A From the schedule, no.

6

Q Is there a way to tell that?

7

A We may be able to reconstruct through

8

documentation of the dates in and out of transfer on

9

schedule "B".

10

Q Do you have the documents with you today

11

with which you can reconstruct the history of the certi-

12

ificates which were originally submitted to the transfer

13

agent but for one reason or another not transferred on

14

that initial submission?

15

A We show those identical certificates being

16

returned.

17

Q Do you have that information with you?

18

A For the date shown on schedule "B".

19

Q Taking this schedule, can we start at the

20

top and go through it and see which ones were rejected?

21

MR. MC ALLISTER: I just want to say for

22

the record I am objecting to this line of

23

questioning although I will permit it to continue.

24

The basis of the objection is that as I understand

25

the law there is no earmarking by Harris, Upham

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 19721
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of any particular certificate for the account of any particular client once a certificate goes into transfer. Accordingly there is no concession by Harris, Upham here that if any of these certificates were rejected by the transfer agent for any reason that that redounds at all to Harold Fisher.

MR. FOLEY: I would like to make a statement on the record. I really don't like this. I don't like it for two reasons, it is not even a valid objection. If there is an objection as to form it is a valid objection at this stage of the game.

Secondly, I don't like it because I have been taking depositions for a couple of years and I am aware of the impact on a witness -- I am not saying you are doing anything deliberate by any stretch of the imagination. I don't know and I don't care. The point that bothers me is I don't like these long monologues on the record which tend to set forth stuff which is not relevant to the examination of this witness. He is here to answer questions which are objectionable only on the grounds of form. That is all we should be

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talking about. We have about two pages of record here which is unnecessary.

THE SPECIAL MASTER: Let's move on. The witness is going to answer the question.

MR. MC ALLISTER: Yes, sir.

A Shall we start with the reconstruction of certificates?

Q Yes.

A Item No. 1 on schedule "B", five hundred shares of Bartep Industries received on October 28, 1968. The certificates shown by number and registration put into transfer by Harris, Upham & Co. on October 29, 1968 and received out of transfer on March 7, 1969. In substantiation of this movement we submit our transfer form dated October 29, 1968 showing the certificates previously described as going into transfer.

Q This fanfold that you are describing here is a transfer unit, is it not?

A Yes, sir.

Q Does this transfer unit reflect what happened to this five hundred shares, these five certificates?

A In the lower right-hand corner of the document it indicates that the shares were received from transfer on March 7. No certificate numbers are noted

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1 Otten 145

2 because in the course of our operations where the same
3 certificate numbers are returned it is assumed that those
4 numbers are coming out on this unit.

5 Q What that means is, as I understand it, these
6 certificates were rejected by the transfer agent, is
7 that correct?

8 A That is what the form indicates.

9 Q What you are telling me is the certificate
10 numbers that are in the lower left-hand corner are those
11 which were forwarded to the transfer agent, is that
12 correct?

13 A That's right.

14 Q You are presuming that the same ones were
15 returned?

16 A Yes.

17 Q Can you say that your records reveal that
18 in fact the same ones were returned?

19 A Yes.

20 MR. FOLEY: May we mark the document
21 Plaintiff's Exhibit 32 for identification.

22 (Whereupon the transfer unit referred to
23 above was marked Plaintiff's Exhibit 32 for
24 identification.)

25 Q The exhibit that you furnished, Mr. Otten,

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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2

I note is a photocopy. Have you tried to get the original?

3

Do you have the original in your files?

4

A Evidently we do, by the photostat. I had

5

no knowledge of the need for the original. This was

6

furnished me.

7

MR. MC ALLISTER: On the bottom of Plaintiff's

8

Exhibit 32 is the notation "original misfiled."

9

That notation was put on by Bill Smythe. He has

10

informed me that we cannot locate the original or

11

any other copy of that document.

12

Q On this document in the lower-left hand

13

quadrant do you notice below the certificate 443 there

14

is a line going down and the letter "N/O" below what

15

appears to me to be an "H". What do those letters signi-

16

fy?

17

A N/O, if I might use the term advisedly here,

18

is the jargon of Wall Street, indicates name of, it is an

19

abbreviated form of the phrase "name of". We use that

20

and it is used universally throughout the Street. The

21

"H" I cannot offer any explanation why it is there. It

22

may have been someone starting to write the name "Howell,"

23

as schedule "B" indicates, that certificate was in the

24

name of Howell Sherman.

25

Q Can you tell me why that would be done on a

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STENOGRAPH AND SHORTHAND REPORTERS

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1
2 A Because the certificates were returned to
3 us by the transfer agent as non-transferable or having
4 some objection which caused them to be non-transferable
5 placed on them. He would note this information to be
6 used for the ultimate return of the certificates to the
7 broker from whom they were received.

8 Q In other words, does the fact of writing
9 this on here constitute a first step towards putting
10 into effect the failing and returning of the certificates
11 to the delivering broker?

12 A Yes.

13 Q Is this only done by a person who is
14 authorized to make the decision to fail and return the
15 certificates?

16 A Well, there is no decision to be made in
17 Harris, Upham. Harris, Upham came into the possession of
18 bad merchandise here through the delivering broker and
19 it is our responsibility to get negotiable stock. In
20 doing so we return it to the broker automatically. It
21 is not a good delivery.

22 Q Below the reference to Lockwood & Co., in
23 that box is an indication "Delivered by American Bank &
24 Trust Company, 10-28-68," below that "dupl. delivery
25 ticket attached to stock." Can you explain what that

SCI * * * REWER

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1
2 box?

3 A Yes, sir.

4 Q Thereby balancing the two entries?

5 A Yes.

6 Q What happened after that about the five
7 hundred shares that were rejected? What is the next
8 record?

9 A Normally any security put in our overnight
10 box is put in there because it is being ultimately dis-
11 posed of through re-entry into transfer or re-delivery or
12 delivery to a customer, and so forth.

13 Q In this instance you know what happened?

14 A Yes, it was put in the overnight for ulti-
15 mate return to the American Bank & Trust Company, account
16 of Lockwood & Company.

17 Q What is the normal procedure with respect
18 to time on a transaction such as this? When securities
19 come back is there any rule or practice at Harris, Upham
20 as to how long it takes from the receipt back from the
21 transfer agent of rejected stock to the time it is sent
22 back to the selling stock broker?

23 A In the normal course of business it would
24 be done as expeditiously as possible.

25 Q Would you be inclined to say if there was any

SCI * * * REWER

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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Q Is there any method by which securities which are rejected by a transfer agent such as this are checked to see that they have been promptly sent out to the selling broker, if indeed that is what is to be done?

MR. MC ALLISTER: Is this 1969?

MR. FOLEY: I am talking about this time, March of '69.

A No, there is no check either then or now. It is an automatic process of daily operation that the certificates would be returned immediately.

Q You are aware, Mr. Otten, are you not, that at this time in March of 1969, Mr. Fisher had already made his demand for cancellation of the purchase of his shares?

A I am not aware.

Q Do you know the date on which that demand was made?

A I am not aware of any demand for cancellation.

Q Are you aware of a telegram that he sent on February 17?

A No, sir.

Q If a customer makes a demand for the

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* * *

Otten

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received, rejected by the transfer agent and failed for cash back.

A Yes.

Q In addition to that we know that seven hundred shares which were reflected as having been purchased, that was an error and that purchase had never been made. That is twelve hundred shares between those two events, is that correct?

A Yes.

Q Can you tell us how many of those twelve hundred were subsequently purchased by buy-in or any other way?

A Seven hundred, because the remaining balance of five hundred is reflected on August 1, 1969, in the error of seven hundred shares going back to October 28.

Q You say that seven hundred was bought in, seven hundred shares out of the twelve hundred?

A Yes.

Q Can you tell us when those transactions took place; who did they buy the seven hundred shares from?

A Who they bought them from? I don't know who they bought it from. I can tell the price, at three.

Q Seven hundred of the twelve hundred was

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1 Otten 194

2 bought in. Can you pinpoint these buy-in transactions
3 and let us know when they happened and the facts about
4 them?

5 A Before I answer that question I would like
6 to say I think the referral to twelve hundred shares
7 here is in error. We are open on only seven hundred
8 shares.

9 Q Out of the twelve hundred you are still
10 open on seven hundred?

11 A No. We are open on seven hundred shares
12 out of a total purchased of five thousand.

13 MR. MC ALLISTER: As of what date?

14 THE WITNESS: We are open on seven hundred
15 shares as of July 31, 1969.

16 (Discussion off the record.)

17 (Recess for luncheon.)

18 EXAMINATION BY MR. FOLEY continued:

19 MR. FOLEY: Will the reporter read the
20 earlier question.

21 (The question was read: "Can you pinpoint
22 these buy-in transactions and let us know when
23 they happened and the facts about them?")

24 A Relating to the sale of March 25, 1969,
25 Exhibit 34, reflects the return of the stock. If you

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will refer to that account of fail to receive 989510, the previous balance before the return of the five hundred shares is indicated on the take-off as of March 24, 1969 at seven hundred shares open. Five hundred shares is returned making the total open fail position at that time twelve hundred shares. The position does not change until June 17, 1969.

Q What happened?

A There is a number missing here. It is page 56-I. On page 56-I of the stock record daily analysis five hundred shares is shown being received for the fail to receive account. The previous balance in that account before this day was 4-18-69 on June 17, five hundred shares comes in for fail to receive leaving a balance now open in the account of seven hundred.

Q What was the price of the five hundred that came in?

A From the indication on the take-off, six and a half.

Q Does that indicate in June you paid six and a half for it?

A We paid the broker six and a half as the contract price of that settlement.

Q That was not a buy-in?

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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210

1 A It could be possible, yes.

2 Q According to Exhibit 38, can you state
3 on what date did the transfer agent return these securi-
4 ties to Harris, Upham?
5

6 A I couldn't say when he returned them.
7 Probably February 17.

8 Q When that says received from transfer,
9 are you referring to your transfer department or to the
10 transfer agent? I suggest to you there is a potential
11 for a little ambiguity there.

12 A Received from transfer would indicate
13 transferred from the transfer account.

14 Q Harris, Upham's transfer account? It doesn't
15 necessarily mean it came in from the transfer agent on
16 that date?

17 A Normally they are taken out of transfer the
18 same day. Whether or not they were at this point I don't
19 know.

20 MR. FOLEY: May we mark this as an exhibit?

21 (Whereupon letter dated January 27, 1969
22 from Registrar & Transfer Company was marked
23 Plaintiff's Exhibit 39 for identification.)

24 Q I would like to show you Plaintiff's Exhibit
25 39 and ask you to note the third and fourth items on the

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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Otten

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2

left column and ask you whether or not the securities

3

we are talking about, namely certificates No. 1420 and

4

1421, are referred to in that letter.

5

A Yes, they are.

6

Q What is the indication?

7

A That these certificates were returned to

8

us by the Registrar & Transfer Company.

9

Q Your fanfold indicates that they came

10

out of transfer in your company on 2-17, whereas this

11

letter indicates they were returned to you on January 27,

12

which is once again about a three-weeks difference. Do

13

you have any explanation for that?

14

A No.

15

Q Is this normal?

16

A As previously stated, no.

17

(Discussion off the record.)

18

Q Do you know whether or not the reason why

19

the apparent inaction from January 27 on with respect to

20

these securities that were returned from the transfer

21

agent -- whether the end of that apparent inaction on

22

February 17 had anything to do with the fact that on

23

that day the telegram arrived from the plaintiff request-

24

ing cancellation of his transaction?

25

A I do not know.

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

1 Otten 212

2 Q After these securities were returned on
3 January 27, do you know what was done with them?

4 A No, I do not.

5 Q Do you know if any effort was made to fail
6 them back to the selling broker?

7 A I do not know.

8 Q I would like you to note on Exhibit 38,
9 down in the lower left-hand quadrant, once again the circle
10 which surrounds the reference to certificates 1420 through
11 1423 has an arrow going from it to the words apparently
12 "fail MLPFS" which I assume is fail sent to Merrill,
13 Lynch on that.

14 A It does read fail. The reason for the
15 wording on there, I don't know.

16 Q Do you know if a fail ticket was prepared
17 at that point?

18 A I do not know.

19 Q Should one have been?

20 A Normally when stock is returned from a
21 transfer agent it should.

22 MR. FOLEY: Do you have a fail ticket,
23 Mr. McAllister?

24 MR. MC ALLISTER: No.

25 MR. FOLEY: Do you have any subsequent

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

1 Otten 213

2 record from the fail records that a fail ticket
3 was prepared for this?

4 MR. MC ALLISTER: Other than the ones you
5 have, I don't know.

6 MR. FOLEY: Without qualification do you
7 have it or don't you?

8 (Discussion off the record.)

9 MR. FOLEY: The last answer Mr. Otten gave
10 was quite clear.

11 A A fail ticket was not made.

12 Q Is there any subsequent record of what
13 happened to these securities?

14 MR. MC ALLISTER: The only one I have,
15 which I believe I have a copy of, is a transfer
16 unit showing four hundred Bartep dated April 11,
17 '69, and only bearing the number 1422/3. I
18 have another transfer unit document dated July 10,
19 indicating that 1421 and 1420 -- they are written
20 in that order -- went into transfer on that date.

21 MR. FOLEY: We will mark these if we may.

22 MR. MC ALLISTER: Sure.

23 (Whereupon the transfer units referred to
24 above were marked Plaintiff's Exhibits 40 and 41
25 for identification.)

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MR. FOLEY: I would like to ask they be described inasmuch as these are a different kind of stock transfer unit. Perhaps a slightly more specific description would be helpful.

This is July 10 of what year?

MR. MC ALLISTER: '69.

A Exhibits 40 and 41 are different in color from our other transfer units because these units are commonly used when the selling broker does not deliver our stock in settlement of any purchase but for reasons best known to himself he has to put it into transfer. For one reason, he may not have the denominations available to complete the purchase delivery and he has to split them up for transfer. And he so tells us that he will put them into transfer on his premises to our name; and to reflect the whereabouts of the stock we use the Exhibits 40 and 41.

Q In other words these certificates are not passing through your hands and out to transfer at the time these documents are prepared, they are going through the hands of another broker?

A Another broker.

Q I am referring now to Exhibit 41, can you tell from this document who put these shares into transfer?

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A Harris, Upham put them into transfer and only used this form in doing it. That is what I was about to say before I was cut off. This is the reason for the color of this form. They are no longer in use.

Q Was the form inadvertently used?

A I don't know the reason for it.

Q It wasn't some other broker that put these in?

A No.

Q Harris, Upham had these securities?

A Yes.

Q We have had an indication here in Exhibit 38 and 39 that on January 27 these certificates numbered 1420 and 1421 were returned from a transfer agent to Harris, Upham. Exhibit 41, which is dated July 10 -- in other words over five months after the return from the transfer agent -- indicates that Harris, Upham had them in its possession at that time and sent them out for transfer again.

Can you tell us what happened to those certificates during that over five month period?

A On February 17, 1969, when certificates 1420 and 21 were received from transfer they were part of a total amount of thirty-one hundred shares taken out

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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1 of transfer on that date. Twenty-one hundred of that
2 thirty-one hundred is reflected on Exhibit 38. A thousand
3 shares of the remaining balance in denominations of seven
4 hundred and three hundred are on our units in front of
5 me not yet marked as exhibits. Shall we mark them?
6

7 Q Not yet. We are just going to get on with
8 1420 and 1421.

9 A Thirty-one hundred shares were received from
10 the transfer account on February 17. Six hundred of it
11 went back into transfer and twenty-five hundred of it
12 was put in our overnight box.

13 Q Offhand do you know if this 1420 and 1421
14 fell to one or other categories of those two?

15 A February 17 of the six hundred going back
16 into transfer, certificate numbers 654 through 56 and
17 664 and 668 for one hundred shares each reflected part
18 of the six hundred shares being re-submitted to transfer.

19 I do not have a document supporting the
20 other one hundred going into transfer that date. That
21 leaves certificates 1420 and 21 in our overnight box on
22 February 17.

23 Q To perhaps cut things short can you tell
24 us whether or not those certificates continued in and
25 out of the overnight box on a daily basis for some period

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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220

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2 Q Will you take a look at Exhibits 40 and 41.
3 Would that indicate to you that transfer had not yet
4 been accomplished as of the dates that these were pre-
5 pared?

6 A Same certificates coming out on September
7 18 on Exhibit 40, yes.

8 Q I note that on Exhibit 40 you have a date
9 of April 11. Would that indicate to you the date they
10 were sent in for transfer or the date they came out?

11 A The date it went in.

12 Q So your prior testimony was it came out
13 of transfer. Now it would seem from what you are saying
14 it went right back into transfer again the same day?

15 A Yes, it was part of fourteen hundred that
16 went back in.

17 Q I notice over here there is a box marked
18 "received from broker" on this exhibit and there is a
19 date of September 18 on it. Can you tell us what that is?

20 A As previously stated these forms are no
21 longer in use. At this time we used them in the regular
22 transfer account of Harris, Upham, so the terminology
23 on there is not referring to the item in any way. It was
24 not received from any broker.

25 Q Was it received back from transfer?

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1 A Received back from transfer.

2 Q Below that the word "rewrite" again, does
3 that mean anything?
4

5 A Only in the instance that since fourteen
6 hundred went back in again they re-wrote a ticket for
7 fourteen hundred shares.

8 Q The word "re-write" doesn't that refer to
9 something in September when it came back from the transfer
10 agent?

11 A It was re-written then.

12 Q Exhibit 40 indicates, at least as far as
13 certificates 1422 and 1423 were concerned, transfer had
14 not yet been accomplished.

15 A That's right.

16 Q Thereafter does re-write refer to once
17 again sending them to a transfer agent?

18 A I don't know if my records go back to
19 September 18.

20 Q What does the terminology mean?

21 A It would mean they were taken out of trans-
22 fer on 9-18 and put in again.

23 Q During all these trips in and out of trans-
24 fer for these particular securities was any indication
25 ever received from the agent as to why transfer was not

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STENOTYPE AND SHORTHAND REPORTERS

1 accomplished?

2 A I would assume there was for them to be
3 rejected. There had to be some explanation with the cer-
4 tificates coming back from the transfer agent.

5 Q Who would know?

6 A Mr. Smythe.

7 Q Would such indication be in writing?

8 A I would think it would be in the form of
9 a letter attached to the certificates or a memorandum of
10 some kind from the transfer agent.

11 Q Is that type of letter or memorandum
12 normally maintained by Harris, Upham?

13 A I think the record would be held like
14 that to support why the certificates weren't transferred.

15 Q Do you have such letters or memoranda for
16 these certificates during this period of time?

17 MR. MC ALLISTER: Only the one we have
18 produced, the one that has been marked Plaintiff's
19 Exhibit 39.

20 Q Going over to Plaintiff's Exhibit 41
21 here I notice that this indicates that on July 10 appar-
22 ently those two certificates, among others, were sent
23 out to transfer and received back from transfer on
24 September 18. I presume that is all 1969.

25 A That's right.

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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223

Q And here is the word "re-write" again.

Does that indicate as late as September 1969 the transfer of the certificates had not been accomplished?

A Yes.

Q By September of 1969 was the rule in effect requiring mandatory buy-ins for fails that were over thirty days in duration?

A Yes.

Q Do you know whether buy-ins were executed with respect to any of these four certificates, 1420 through 1423?

A We couldn't buy-in the certificates because we showed them not being owed to us by anybody. We had physical possession of the stock. We were stuck with it at that point, to put it plainly.

Q This stock was being rejected constantly by the transfer agent, was it not?

A Yes.

Q Was it not the normal practice when stock was rejected by the transferring agent to return it to the selling broker?

A Yes, it was.

Q That was not done here?

A Evidently not.

S. J. GREWER

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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Q Any reason why that you know of?

3

A I don't know.

4

Q Who would know?

5

A Mr. Smythe.

6

Q Looking again at Exhibit 31-B-1, item 3,

7

do you know whether or not at any time ever transfer of those certificates was accomplished?

8

9

A I do not.

10

Q Do you know whether they were ever failed

11

back to a selling broker?

12

A I don't know that either.

13

(Brief recess.)

14

Q Perhaps now we will take a look at item

15

four. To pick up the first point, there is a seven hundred share error reflected here. This is the famous seven hundred, isn't it?

17

18

A Yes, sir.

19

Q The date of receipt here is November 13,

20

1968. You got a one hundred-share certificate that date?

21

A Yes, sir.

22

Q That was put in for transfer the following

23

day and received back from transfer once again on

24

February 17?

25

A That's correct.

SCHON GREWER

1 BECKMAN ST. NEW YORK, N.Y. 10038
STOCK TYPE AND SHORT-TERM DEPOSITS

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

Otten

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Q Do you know in what shape or form it came back? Was it rejected or what?

A Yes, the same certificates were received back on February 17.

Q Do you have the fanfold on that?

A Yes, I do.

Q Is that one that shows three hundred shares?

A Yes, dated November 14, 1968 at the top.

MR. FOLEY: Please mark that.

(Whereupon the fanfold, 11/14/68, referred to above was marked Plaintiff's Exhibit 42 for identification.)

MR. FOLEY: Please mark this 41-A and

41-B.

(Whereupon the documents referred to above were marked Plaintiff's Exhibits 41-A and 41-B for identification.)

Q Looking at Exhibits 41-A and 41-B, of which my copies are very poor because they are cut off at the edge, at the time that 41-A was prepared, can you state in whose name were these certificates, No. 1420 and 1421 -- these two?

A On information previously furnished, in the name of Merrill, Lynch, Pierce, Fenner & Smith.

SCHON-GREWER

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1

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2

3

4

Q Prior attempts at transfer had been attempts to transfer to the name of Harris, Upham, is that not true?

5

A That's right.

6

7

8

Q On this occasion however a change was made, it was now transferred to the name of Bernard Miller, is that correct?

9

10

A From the Exhibit 41, yes, that attempt was being made.

11

12

Q Do you know how come it got into Mr. Miller's name?

13

14

15

16

A Mr. Miller evidently was long shares of Bartep Industries, and instructions were given to have his stock transferred to his name and ultimately sent to him.

17

18

19

20

Q In Exhibit 31-B-1, the indication there was that these same certificates were included in those which Harris, Upham were utilizing for the purpose of completing Mr. Fisher's transaction?

21

A Yes.

22

23

Q And now they have left Mr. Fisher's batch and gone over to Mr. Miller's, is that right?

24

A Evidently, yes.

25

Q This was incidently after several months

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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of attempted transfers which had, for one reason or another, not been feasible, had been rejected?

A Right.

Q Do you know was a swap made, in a sense, of other securities which had formerly sort of been considered as for Mr. Miller, and were they placed into Mr. Fisher's account?

A There is no way of knowing that. The specific certificates are not identified under our system of custody.

Q There is no way in the world to tell then how come all four of these certificates, 1420 to 1423, which came from Mr. Fisher's account where they had been since November to at least the following September, and then at that point they appear in Mr. Miller's account.

A These certificates were never reflected in Mr. Miller's account, these certificate numbers. Mr. Fisher's account reflected a long position of five thousand shares. The identity of said shares could not be made by specific certificates.

Q Aren't you identifying them in 31-B-1?

A They were certificates being used for the transfer to the name of Harris, Upham originally.

Q That particular transfer was part of the

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EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

* * *

Otten

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February 17.

Q What happened to the security?

A It was previously determined that the certificates mentioned in Exhibit 42 were part of thirty-one hundred shares received out of transfer on 2-17, six hundred of which were put back into transfer -- not these certificates -- and these certificates were included in twenty-five hundred put into our overnight that night.

Q I would like you to look at 41-A and 41-B and tell me whether or not by September of 1969 these securities found their way into the group which were being used to get transfers in the name of Bernard Miller.

A That's right.

Q Is it fair to say they followed essentially the same route as 1420 to 23 that we had before?

A Yes.

Q Do you know why it was decided to include these in Mr. Miller's account?

A They are not included in Mr. Miller's account. Mr. Miller's account reflects him owning three thousand shares, thirty-five hundred shares on September 18. And the certificates needed to transfer shares to Mr. Miller's name include certificate 905.

Q Prior to September 18 can you tell us what

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

Otten

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1 efforts were made to transfer these certificates 905
2 through 907, and into whose name were they sought to be
3 transferred?

4 A Up to September 18 certificates 905 through
5 7 were put into transfer or were carried in transfer to
6 be transferred to the name of Harris, Upham and Company.

7 Q Was that with respect to any particular
8 transaction or purchase you can identify?

9 A Not at that time.

10 Q Inasmuch as you included a reference to
11 these certificates in Exhibit 31, would you say that at
12 the time of their receipt originally in November, 1968,
13 they were received for the purpose of accomplishing an
14 order of any particular customer?

15 A Yes, they were.

16 Q They were then identified in one way or
17 another with Mr. Fisher, is that not true?

18 A Yes.

19 Q By September they became identified in
20 one way or another with Mr. Miller, is that true, when
21 you put them in for transfer in his name?

22 A That's right.

23 Q You can't explain any significance what-
24 ever or any explanation of why that change took place?

25 A No.

SCHWAB-GREWER

1 BELLMAN ST. NEW YORK 10013 JAMES EATOLA 7-0123 - PARLEY 7-0398

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

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Q Do you know whether any change at all took place in the contemplated use of these securities up until February 18, at the time they were suddenly put in for Mr. Miller or prior to that?

A I don't understand the question.

Q Considering now the occasions when they were put in for transfer prior to that?

A Yes.

Q They were originally received for the purpose of accomplishing the Fisher transfer?

A That's right.

Q In the course of accomplishing that they were put in transfer for the Harris, Upham name?

A Yes.

Q That was done again and again up until September 18?

A That's right.

Q On that particular day some change took place that these were now utilized for transfer to Mr. Miller's name rather than the former use that had attempted to be made?

A That's right.

Q You don't know why that happened?

A Yes, I do.

EXCERPTS FROM DEPOSITION OF ARTHUR J. OTTEN ON MARCH 22, 1972

1 Otten 242

2 Q Can you tell us?

3 A Because Mr. Fisher's shares no longer
4 appeared on our books at that time.

5 Q When were they taken off?

6 A Upon delivery of five thousand shares on
7 April 9.8 Q Were there no attempts to transfer this
9 into the Harris, Upham name after April 9?

10 A Yes, they were on July 10.

11 Q How come the delay in making this change
12 to Mr. Miller? Do I understand your testimony correctly
13 as follows, that the reason for changing the procedure
14 away from the former practice of trying to get transfer to
15 Harris, Upham's name and instead now trying to get transfer
16 to Bernard Miller's name, was because Mr. Fisher's shares
17 were off the books, and they had gone off the books about
18 six months before in April, and in the interim similar
19 changes into Harris, Upham's name had been attempted?

20 A We attempted transfer to our name, yes.

21 Q Is there a connection that you can explain
22 between the removal of shares due to Mr. Fisher on April
23 9 from the books of Harris, Upham and the fact that on
24 September 18 for the first time an effort was made to
25 transfer these particular shares into Mr. Bernard Miller's

6011 * * * SEVEN

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* * *

1 Q In other words, you were thinking that maybe, as
2 I take it, it was time he thought about doing something
3 about this particular investment?

4 A Since it was not working out.

5 Q And he wanted to consider what he wants to do
6 about this?

7 A What he wants to do. Yes.

8 Q This would be part of the normal services that
9 you would render for a customer in terms of giving him
10 generalized advice and in reviewing his portfolio; is that
11 correct?

12 A I would not review his portfolio. I would not
13 say that, but I was talking about the stock Bartep because
14 in my opinion it was not acting right.

15 Q So the 14th of January he told you within a few
16 days he would start making a decision?

17 A He did not say decision. He said he would let me
18 know what he wanted to do.

19 Q Did he let you know?

20 A Yes. To the best of my knowledge at this
21 particular time, perhaps a week later, maybe about the third
22 week in January, the 20th, I can't pin it down.

23 Q But at some short time?

24 A He said I want my stock, in a nice way, because
25 he says I want my securities. Fine. I said, "Harold, I will

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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1 order them out," and I went to Mallett, and I said, "Look,
2 Bob, I want these certificates expedited as fast as humanly
3 possible. Harold Fisher wants his stock," and I am not
4 asking him any questions.

5 Q This was the Bartep?

6 A Yes. Nothing else.

7 Q He was leaving everything else in Harris Upham's
8 possession?

9 A I can't remember the date he ordered the other
10 certificates out, but that is a matter of record. I am
11 talking about Bartep.

12 Q He singled Bartep out and said this is the one I
13 want?

14 A Yes.

15 Q And he wanted all the securities delivered to his
16 personal possession?

17 A Yes. I mean I can't be pinpointing it to the
18 exact date.

19 MR. FOLEY: That is all right. You have given
20 your honest estimate.

21 A It may be the 25th, in that area.

22 MR. FOLEY: You have given it within a week anyhow,
23 and I recognize that as your best estimate under the
24 circumstances, and probably very close to accurate.

25 Q Now, thereafter how long do you think it would

1 normally take to get delivery? This did not involve a
2 further transfer, did it?

3 A Yes, because as far as I am concerned it is in
4 street name.

5 Q He wanted delivery in street name?

6 A No. At this time he did not talk about street
7 name. He wanted delivery in his name.

8 Q Then this would involve an instruction to send
9 the securities --

10 A To transfer and ship the securities in the name of
11 Harold Fisher.

12 Q And when you made this inquiry were you aware at
13 that time that any difficulty had been encountered in the
14 transfer of these particular securities?

15 A I was not.

16 Q So what did Mallett say?

17 A I went to Mallett, and I said, "Expedite delivery."
18 Mallett, I believe, which is the way he would do it in the
19 case of expediting something fast, the normal procedure is
20 for the girl to type up the transfer and ship instructions
21 and mail it to New York, which could take three or four
22 days until it gets to H.U. at 120 Broadway and from that
23 point I don't know the procedure as far as what happens
24 from that point on, but I imagine they take it to whoever
25 takes care of it.

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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Q Takes care of the transfer?

A Yes. In this particular case Mallett instructed probably Lil, he instructed Lil to wire transfer and ship instructions on the Telex because I wanted it expedited without wasting any time.

Q And you received in one way or another an assurance that it was done?

A That it was done. That is all.

Q That it was done?

A Right.

Q That this expedited manner of performing this was performed?

A Yes.

Q Have you a copy of that?

MR. McALLISTER: No. I searched the Miami Beach office for it and found there was no such document in existence; we had already scoured their day's work files in Harris Upham's warehouse and it apparently is not in there according to the people that came up and produced the documents presently in Mr. Harris' hands.

Q When an instruction goes out in this expedited manner how long would you normally expect to have to wait before you would get some response to it?

A Normal delivery should take anywhere from three

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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1 to four weeks, normal delivery. The way we were trying to
2 expedite it I guess it could be done -- I don't know. This
3 is normal delivery. I honestly don't know if a guy would
4 take it to the transfer agent and he had the stock it would
5 be done right away.

6 Q Did you have any conversation with Lillian or Lil
7 at that time relative to Bartep apart from just conveying
8 this instruction?

9 A No, I would not have any conversation with Lil
10 outside of I might ask her to, I might ask her, "Did you
11 do it?", but actually the conversation I had was with
12 Mallett.

13 Q According to Plaintiff's Exhibit 45 from the
14 middle of December, from December 19th on, and that was
15 well over a month before this occurred, Lil was in receipt
16 of information that there was a transfer difficulty with
17 Bartep securities?

18 A I never saw this. You showed this to me before.

19 Q I did. I am interested now, I am stating now for
20 the purpose of framing a question that Exhibit 45 shows that
21 on December 19th Lil had been asked to pursue the matter of
22 why there was a transfer delay in Bartep. Now when you gave
23 your instructions to Mallett and he in turn conveyed them to
24 Lil, I presume you all worked more or less in proximity to
25 one another, you were all in the same office?

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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1 A Yes.

2 Q Maybe where she was working was a couple of steps
3 from where you are?

4 A No. She is behind the cage.

5 Q Do you and she communicate with each other by way
6 of "Hello," or otherwise pretty nearly every day?

7 A Yes. "Good morning," or I might -- actually
8 that would be about all; actually that would be about all
9 unless I wanted to know something specific. If I wanted a
10 file I'd ask her to get it out for me.

11 Q When Lil got these instructions to expedite the
12 transfer of the shares to Harold Fisher's name did those
13 instructions say from whose name they were to be transferred?

14 A No, as far as I know they don't have that.

15 Q Inasmuch as you had executed the order some
16 several months before was it your presumption at that time
17 that they had by then been transferred to the name of
18 Harris Upham?

19 A I would assume that it would be. As far as I am
20 concerned the stock should be in a vault in street name
21 segregated for Harold Fisher and if I ordered out in his
22 name they should take those certificates in street name, send
23 them to the transfer agent for them to have them transferred
24 to the name of the client and send them out. That is it as
25 far as I know.

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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1 Q Did Lil or anybody else in the office say anything
2 to you about the difficulty that your office was
3 unquestionably in possession of knowledge about?

4 A No.

5 Q About the transfer?

6 A Maybe they were in possession. I was not.

7 Q About the transfer of Bartep?

8 A No. This is the first time I ever seen this.

9 MR. McALLISTER: Referring to Plaintiff's Exhibit 45.

10 MR. FOLEY: Off the record.

11 (Discussion off the record.)

12 MR. FOLEY: On the record.

13 Q Now your testimony was that if this was not an
14 expedited request it would take two or three weeks to get
15 the transfer and shipment to the customer?

16 MR. McALLISTER: Three or four.

17 A Three or four weeks, I said.

18 Q How much time do you think you expected to save
19 by expediting the request?

20 A Well, first of all, I'd save probably three or
21 four days in the mail in transit, which would take roughly
22 a week, maybe. I don't know. It is very difficult for me to
23 say. These were hectic times.

24 Q After this message that you sent to expedite the
25 transfer --

EXCERPTS FROM DEPOSITION OF BENJAMIN COWAN ON MARCH 28, 1972

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1 A I did not send it.

2 Q That you had sent.

3 A I instructed Mr. Mallett. I told him that Mr.
4 Fisher wanted his certificates expedited as fast as possible.

5 Q After that was Mr. Mallett involved in this thing
6 on a regular basis on this question of transfer?

7 A Everytime something came up where Harold was lacing
8 it into me I went to Mallett.

9 Q What was the next thing you heard after sending
10 out this request to transfer to Fisher's name and deliver
11 to him? What was the next thing that happened about this?

12 A Outside of being hounded every day.

13 Q Including being hounded?

14 A I was hounded every day constantly. From that
15 point on I was hounded every day.

16 Q Every day from around January 21 on?

17 A Around that.

18 Q In the course of that hounding did he request that
19 you sell him his stock?

20 A He said, "Put in an order. Let's see what
21 happens. Put in an order to sell 1000 shares."

22 Q And that order is reflected in Exhibit 57 which
23 has already been marked for identification.

24 A I would not do this on my own, you know.

25 Q The Telex does not exist which conveyed this to

1 the OTC department; is that correct?

2 MR. McALLISTER: I believe so. Yes. A search was
3 made for it. It is not in the Miami Beach office or in the
4 OTC department.

5 Q And the answering Telexes have not been found?

6 A No.

7 MR. McALLISTER: No.

8 Q I notice that rubber stamped across this order
9 are the words, "nothing done." Who did that?

10 A The girl on the Telex does that. At the end of
11 the day whatever orders are not executed she stamps them,
12 "nothing done."

13 Q Was that now a day order?

14 A That was a day order.

15 Q And it was a dead issue as far as anything was
16 concerned after that?

17 A For that day.

18 Q I would presume then that the fact that no bid was
19 obtained, that information was conveyed to Mr. Fisher?

20 A I told him that we could not sell the stock at 7½.
21 Whether I had a quote on it or not I can't honestly say. I
22 don't remember.

23 Q Normally you would expect a quote of some sort,
24 would you not?

25 A I may have had it and may have given him a quote.

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1 securities didn't the conversation then disclose that he
2 was interested in the securities and had bought it?

3 A He may have mentioned he bought, whether he
4 mentioned how many shares he bought I can't honestly
5 remember. I don't think he did, but I can't remember.

6 Q Did Mr. Weiner participate in the discussion to
7 the extent of inquiring as to any facts concerning the
8 company, Bartep?

9 A No.

10 Q Did Mr. Weiner order the 5000 shares which he
11 subsequently bought at that time or did he order it at a
12 later date?

13 A He ordered it after -- on the way back here to
14 the office, I drove him back to pick up his car. He said,
15 "What is this with this stock?" I said, "I honestly
16 don't know anything about it, only what Harold Fisher has
17 mentioned," so he said, "well, what is it?" I said, "It
18 must be about six dollars or so." He said, "So buy me 500
19 shares of it." I believe we went through this testimony.

20 Q As I recall, you had testified that at some time
21 Harold Fisher did commence bothering you or hounding you,
22 using your expressions, I believe, for delivery of the
23 stock?

24 A Oh, yes. Definitely.

25 Q And that this hounding or bothering certainly

1 started before the end of January?

2 A I don't think I ever used the word "bothering."
3 He was quite insistent upon wanting his stock. Maybe I
4 used the word "hounding," but he was very insistent. He
5 really wanted his stock.

6 Q Now up to the middle of February or up to the end
7 of January, Mr. Cowan, you had had obviously many telephone
8 conversations with Mr. Fisher?

9 A Oh, yes.

10 Q And some visits in person?

11 A I believe so. Yes. At the office you are
12 referring to?

13 Q Yes.

14 A Yes.

15 Q Did there come a time during any of these conversa-
16 tions when you and he had discussed any rumors concerning
17 Bartep Industries?

18 A During that period?

19 Q That is right.

20 A Not that I recall.

21 Q Excluding any conversation with Mr. Fisher had
22 you heard of any rumors in South Florida here in Miami
23 concerning Bartep Industries stock?

24 A I never heard of Bartep until Mr. Fisher mentioned
25 it to me.

* * *

SCHEIDT & BOWEN

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TELETYPE AND SHORT-TERM REPORTERS

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

* * *

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1 situations you are talking about where there is a kind of a
2 specialized local market?

3 A You can't determine from dealer to dealer what the
4 volume is, who is buying or selling them.

5 MR. HARRIS: May I ask a few questions?

6 MR. McALLISTER: No.

7 Q Did you ever make any calls to local brokers with
8 regard to any local prices on Bartep?

9 A No.

10 Q Do you know if Shannon has a New York trading
11 number?

12 A Positively, no. I don't know, positively. I
13 imagine he might have.

14 Q What is your recollection of the first report
15 that you received in late January of a reaction or comment
16 from Mr. Fisher with regard to his Bartep purchase?

17 A In late January? Ben Cowan came to me and said
18 Mr. Fisher wants delivery of his stock, so I said, let's
19 put the transfer and ship. That is all.

20 Q Did he say he wants delivery in his own name or
21 in street name?

22 A In his own name.

23 Q In late November did Mr. Cowan ever tell you about
24 any discussion he had with Mr. Fisher with respect to these
25 shares?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 A Well, Mr. Fisher and Mr. Cowan were in constant
2 communication day and night.

3 Q I am talking about the problem of Fisher selling
4 his shares?

5 A No. He never -- I don't recall. No.

6 Q Do you know whether or not at any time prior to
7 the end of January Mr. Fisher ever told Mr. Cowan anything
8 to the effect that he had an idea of somebody who might
9 buy his shares?

10 A I don't recall Ben ever telling me that.

11 Q Do you recall Mr. Fisher getting into a pattern
12 whereby he was to quote Mr. Cowan hounding him one or more
13 times day to get his stock?

14 A Yes, that is correct, after the late part of
15 January when we put it in transfer he wanted immediate
16 delivery. Ben was a nervous wreck and he communicated with
17 me on the subject.

18 Q Is the latter part of January your best recollection
19 of that?

20 A It is about as close as I can come. I am sorry.

21 Q Let me ask you this. Do you recall at any time --
22 forgetting now the end of January or November or any time
23 after even later -- ever hearing that Mr. Fisher said or
24 indicated that he had a person who he thought would or
might buy his shares?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 A No, sir.

2 Q Do you ever recall in January Mr. Fisher saying to
3 Ben Cowan, "Why don't you get my order cancelled and get
4 me back my money so I can do some more business with you"?

5 A Ben mentioned that to me and I told him it was
6 impossible.

7 Q This was part of this business when he was
8 hounding him, is that correct?

9 A Yes.

10 Q That would be in January, 1969, as you testified?

11 A Yes.

12 Q In other words, when you say it was impossible
13 you were rejecting the request?

14 A Yes. It did not make any sense coming from him,
15 especially.

16 Q Can you tell us what your thinking is in that? I
17 feel you have something to say about this and I don't quite
18 understand why it would be so difficult.

19 A A person can't make a purchase and then decide
20 to cancel it.

21 Q In other words, you knew then that the company
22 would not?

23 A It is like going into a store and buying something
24 and it is not returnable. That is it.

25 Q I would like to show you a Telex which has been

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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1 marked as Exhibit 61. As a matter of fact, to make things
2 a little more comprehensible I will also show you Exhibit
3 63 and 64, which I would like to point out to you are
4 addressed to Lauderdale, not you.

5 A Yes.

6 Q Now you notice that the ones in Lauderdale, one
7 or other of them, is addressed to Larry?

8 A That must be one of the Registered Reps there.

9 Q Do you know anybody named Larry up there?

10 A No.

11 Q Do you know a Registered Rep named Hagstrom?

12 A No.

13 Q Do you know Mr. Simpson?

14 A Yes.

15 Q You knew him then?

16 A Oh, sure I knew Simpson.

17 Q How long?

18 A Well, we met at Atlanta. We met in St. Pete.

19 Q Try to figure back, how long do you know him?

20 A Face to face, I guess I only saw him twice or
21 three times. I spoke to him on the phone.

22 Q Did you know him in October, 1968?

23 A Oh, yes.

24 Q The purport of these messages, the things they
25 seem to share in common is that orders had been placed for

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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* * *

.1 inhibiting effect.

2 Q With that in mind isn't it a fact you will find
3 that very often a Florida broker won't put all his quotes on
4 a stock like Bartep?

5 A We have no way of knowing what a broker is making
6 a market in.

7 Q Do you check to find out among local brokers?

8 A No, because if he is in the pink sheets we call
9 him. If he is not in the pink sheets we don't call him.

10 MR. FOLEY: Off the record.

11 (Discussion off the record.)

12 MR. FOLEY: On the record.

13 Q I am going to show you two exhibits, 69(a) and 69(b),
14 and I wish to assure you that they were furnished to us stapled
15 together and I have been told by Mr. McAllister that he
16 found them in the defendant's files stapled together.

17 A This is Mr. Cowan's handwriting.

18 Q This is 69(a)?

19 A That is Mr. Cowan's handwriting, which was put on
20 a wire and this letter typewritten was a confirmation on
21 this to New York.

22 Q So, in other words, two communications were sent
23 to New York, one by wire and one by letter?

24 A Yes, sir.

25 Q Is it the practice to wire delivery instructions?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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1 A Yes, when the delivery instructions are complicated
2 such as this, attention of so and so.

3 Q I am interested in your characterization. Will
4 you describe this as a somewhat complicated delivery
5 instruction?

6 A Well, they are to a bank. Yes. They are specific,
7 attention of a certain person in a bank.

8 Q Do you know anything about this?

9 A Yes, I knew it. Sure.

10 Q Do you recall it?

11 A Yes.

12 Q Can you tell us what happened at the time? In other
13 words, let's go back one step further. Presumably there was
14 one or more communications with Mr. Fisher which arrived at
15 the point where the data was accumulated that is put in here
16 about who at the bank, et cetera, and this communication or
17 series of communications with Mr. Fisher began at some
18 particular point. Let's start off by saying at the beginning
19 when this particular episode began, what was Mr. Fisher's
20 desires at that time?

21 A Previous to this it goes back to the original trans-
22 fer instruction to ship the stock in his name.

23 Q That is the testimony you gave before?

24 A Right. That is correct.

25 Q Yes.

SCHON-GREWER

1 BEERMAN ST. NEW YORK, N.Y. 10038 BARCLAY 7-9741 - BARCLAY 7-9398

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 A And this was cancelled to making shipment to the
2 bank.

3 Q The original instruction to transfer in Mr.
4 Fisher's name, that was late in January?

5 A Yes.

6 Q This was approximately three week's later?

7 A Correct.

8 Q During those three weeks was Mr. Cowan reporting
9 to you that Mr. Fisher was "hounding him" to get the delivery?

10 A Correct.

11 Q During that period of time did you ever inquire
12 why he was not getting his delivery in his own name?

13 A I believe I called New York several times, Mr. Al
14 Key.

15 Q You spoke to Al Key in New York about it?

16 A Yes.

17 Q What did you say to him and he to you?

18 A He said he was doing the best he could. He had
19 trouble with the transfer agent then I subsequently learned.

20 Q At that time did he tell you what was the trouble?

21 A You are asking me to remember?

22 Q Yes, if you remember?

23 A No.

24 Q You don't remember?

25 A No.

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 Q You do recall, however, that it was in New York
2 at that time there was some particular problem?

3 A Yes, because if they were not delivering there
4 must be some problem.

5 Q Going beyond that deduction, which I think is a
6 valid deduction, from the documents you have seen here today,
7 but going beyond that, do you have a present recollection
8 now of the fact that during those conversations with Al Key
9 the question came up there was something which was creating
10 a difficulty in this transfer and that that was his response
11 to you when you called him up and asked him what is wrong
12 here, why don't we get the delivery?

13 A I don't recall when I asked him about this specific
14 stock. We had previous trouble with a lot of over the
15 counter securities at that time in that period.

16 Q Your testimony, as I recall it, was you had a
17 conversation with Mr. Al Key at the time when Fisher was
18 hounding Cowan to get delivery of the securities in Fisher's
19 name, and my understanding of your testimony was Al Key
20 told you there was some kind of a problem, which as you
21 stated a moment ago was rather obvious?

22 A Yes.

23 Q Now did Cowan tell you what the nature of the
24 problem was?

25 A You mean Al Key?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 Q Or Al Key, rather?

2 A No, he did not.

3 Q Did he tell you whether the question involved the
4 transfer of Bartep generally as opposed to the transfer of
5 these particular certificates?

6 MR. McALLISTER: If you know.

7 MR. FOLEY: If you know. Everything is if you know.

8 A No, I don't know.

9 Q Do you know whether there was any difficulty with
10 regard to any registration or other invalidity on these
11 certificates?

12 A No.

13 Q Do you know whether or not there was a problem
14 with the transfer agent?

15 A I know now, but I did not know then.

16 Q But at that time he did not tell you what it was?

17 A I did not know.

18 Q He did not ask you to do anything at that time to
19 help clear up a situation down here by asking other people
20 or having anybody else do it?

21 A No, sir.

22 Q He was handling the whole thing in New York?

23 A Yes.

24 Q Who brought up the question with Mr. Fisher of
25 shipping the order, of changing the order from shipping his
in/

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

* * *

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1 Q Now, refer to Exhibit 106, August 8th, do you
2 recall anything about this?

3 A They never resumed shipment.

4 MR. FOLEY: Mark this.

5 (Document above-referred to was marked
6 Plaintiff's Exhibit 107 for identification.)

7 MR. FOLEY: Mark these.

8 (Documents above-referred to were marked
9 Plaintiff's Exhibits 108(a), 108(b) and
10 108(c) for identification.)

11 Q I would like you, first of all, to take a look at
12 107. As I understand it that affects another office,
13 Lauderdale. It is not your office, is that right?

14 A Yes, that is Lauderdale. I don't know that.

15 Q You know nothing about it?

16 A No.

17 Q I would like you to look at these three, 109(a),(b),(c).

18 A I don't remember this one at all.

19 MR. McALLISTER: Referring to 108 what?

20 MR. FOLEY: (a).

21 MR. McALLISTER: (a).

22 QQ Tell me, on this 108(a), who is MES?

23 A Matt Smith.

24 Q Take a look at the other two and see if you can
25 recollect what this is all about?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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MR. McALLISTER: Do you have any recollection at all?

A I don't ever remember sending Matt Smith a wire
on Bartep at all.

Q Do you know who this American Bank was?

A I never heard of it. Joe Mancuso, that is news
to me.

Q Do you know whether or not in fact any shares of
Bartep were failed back to Shannon?

A I don't know.

MR. HARRIS: May I ask a question on this?

MR. McALLISTER: Yes.

MR. HARRIS: Mr. Mallett, to see if we can refresh
your recollection, in the early part of April you have
no knowledge, is it your testimony that you have no
knowledge that your office, Lil or whoever, yourself,
were instructed by I. J. Shannon firm down in Miami
to advise New York to send shares of Bartep back to
American Bank Trust Company for the account of Shannon
against payment, that there would be no problem?

THE WITNESS: There is one name there, Mancuso.
That strikes a note somewhere. Mancuso? Mancuso?

MR. HARRIS: We suggest that the name Mancuso is
an employee of American Bank and Trust Company.

THE WITNESS: I think Lil got a wire asking to ask
I. J. Shannon who they should send the stock to, and that

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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is the name she got out, Mancuso is the one that
brought my memory back.

MR. HARRIS: And the stock in question was Bartep stock?

THE WITNESS: Yes. How much or what I don't know.

MR. HARRIS: And it was to return the stock to
American Bank against payment?

THE WITNESS: That is right.

MR. HARRIS: And we suggest this is one way you
return stock for one reason or another and get your
money back.

THE WITNESS: Well, I did not know if they did it
or not. I have no knowledge of that.

MR. FOLEY: There will be one more document to mark.

(Document above-referred to was marked

Plaintiff's Exhibit 109 for identification.)

Q In this matter that you have just reviewed, Exhibits
108(a),(b),(c), do you know whether the Bartep stock that was
involved was Fisher's or anybody else's?

A I have no way of knowing it.

Q Would you know this, was the Bartep shares which
had been involved with one of the customers of your branch?

A I would not know that either. What do you mean?
We only had two customers, Fisher and Weiner, and he bought
500 shares. He sold it but under a new name.

MR. McALLISTER: Much later.

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 MR. FOLEY: The reason I asked you inasmuch as you
2 became involved in it would that signify to you it
3 involved shares one of your customers was involved in?

4 THE WITNESS: I have no way of answering that
5 because I would not know the stock position in New York.

6 Q I would like to show you this telegram which has been
7 marked as Exhibit 109. It is a Xerox of a telegram:

8 A I would have no knowledge of this at all.

9 Q This is a notice of intention to buy in.

10 A Yes. It is a "buy in" notice.

11 Q Were you ever informed that such a notice was sent
12 in July? It looks like July 16th?

13 A No.

14 Q Mr. Mallett, I want to ask you one or two
15 questions now, but with a preamble, and that is in the course
16 of giving me these answers to these questions I wish you to
17 know I am not asking you to tell me anything that occurred
18 between you and Mr. McAllister in the way of conversations
19 or instructions or any statement which I think it is only
20 fair to say Mr. McAllister might very well regard as a
21 privileged statement. Now, in the preparation of this
22 deposition did you review the matter?

23 A In what way?

24 Q To refresh your recollection and to reacquaint
25 yourself with the facts of the case?

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLET ON
MARCH 29, 1972

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1 A The only thing I did was read what we had on file.
2 I read a copy of Mr. Fisher's deposition, and I read his
3 whole file that we had on file, his statements, and there
4 was not very much in that file. I gave you the file, Mr.
5 McAllister, and there was nothing there.

6 Q I believe you testified earlier that among the
7 papers you reviewed were the Telexes and various other
8 messages we have been talking about today?

9 A That was the ones Ben Cowan had. I reviewed
10 those, the ones he kept.

11 Q Did you see many here today that you had never
12 seen in your life before?

13 A Yes, a lot of them I had never seen before.

14 Q In the course of your review for this deposition
15 did you examine everything that you knew of that was available
16 to you so that your recollection would be as keen as possible?

17 A Yes, I did that, but there was not very much to
18 review. We did not have much because unfortunately New York,
19 a couple of years ago, they started to question us and call
20 us to send them everything we had and we kept sending and it
21 was only after a while we said we should keep a copy of that
22 stuff before we send it up and then we started to make a copy
23 of the damn thing. I did not know there was a big suit on
24 for a long time.

25 Q Recently, let's say during this week or over the

EXCERPTS FROM DEPOSITION OF ROBERT M. MALLETT ON
MARCH 29, 1972

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1 last several days in the preparation for this deposition did
2 you review the copies that you had retained and certain
3 other ones that were shown to you to get you acquainted
4 with what the case was about?

5 A There was not that much to review, I will tell
6 you that right now.

7 MR. FOLEY: Off the record.

8 (Discussion off the record.)

9 MR. FOLEY: On the record.

10 I am through.

11 MR. McALLISTER: I have no questions.

12 (Whereupon, at 3:50 o'clock p.m., the examination
13 was concluded.)
14
15
16

17 Subscribed and sworn to

18 before me this ____ day

19 of _____ 19__
20
21
22
23

EXCERPTS FROM DEPOSITION OF JAMES J. SIMPSON ON MARCH 29, 1972

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* * *

1 Q A full year at the time in question?

2 A Yes.

3 Q Over a year?

4 A A little over a year.

5 Q Was he a beginner when he started with you a year
6 before?

7 A No. He was registered and working with Scheffmeyer then

8 Q He came along with the organization?

9 A He came with the organization.

10 Q This message of Mr. Al Key addressed to Larry in
11 your office, Exhibit 64, indicates that Larry was seeking
12 to effectuate some trades in the stock of Bartep, is that correct?

13 A It may be that he asked 1000 quote and got this or
14 it may be that he asked could he enter the order.

15 Q Does it also indicate more than just the entry of
16 an order that the message had gone to New York that Wesco
17 was making a market?

18 A He may have said Wesco is making a market, could we
19 do it locally. I have no way of knowing.

20 Q Mr. Simpson, do you see the substance of this
21 message, other than the comments about Wesco, state, we do
22 not wish make trades this stock --

23 A I understand that.

24 Q -- refer to Bartep, is that correct?

25 A Yes. That is absolutely correct.

EDWARD BREWER

1 BEEKMAN ST. NEW YORK, N.Y. 10038 BARCLAY 7-1113 - BARCLAY 7-9308

EXCERPTS FROM DEPOSITION OF JAMES J. SIMPSON ON MARCH 29, 1972

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1 Q Does that help refresh your recollection?

2 A No.

3 Q Had you advised New York at all concerning any
4 news, gossip or rumors circulating locally in Fort Lauderdale
5 or South Florida generally concerning Bartep securities?

6 A If I did, I don't recall it. I don't think so.

7 Q Do you recall, obviously not the yellow slip, but
8 do you recall having any conversation with Larry concerning
9 Bartep at or about February 7th?

10 A I could have had some conversation with him, but
11 I do not recall it.

12 Q Do you recall Larry bringing to your attention that
13 New York does not want to make any trades of Bartep stock?

14 A I knew that they did not want to make trades, but
15 I don't know how I got that information.

16 Q Did you know at this time February 7, 1969?

17 A I think so, but I have no present knowledge.

18 Q Where did you get this knowledge that New York,
19 the home office of Harris Upham, did not want any trades
20 of Bartep?

21 A I think from the fact that they had failed to
22 execute these orders on the 4th.

23 Q Is that the only documentary reference that we have
24 available from which you think you derived your knowledge
25 that New York did not want trades in Bartep?

1 A As far as I know, that is it.

2 Q If New York really did not want trades in Bartep
3 would they not in response to the February 4th orders
4 have so indicated emphatically on Telex message?

5 MR. McALLISTER: I object to the form. Don't answer.

6 Q Would New York have called you on the telephone
7 and discussed this matter of Bartep securities?

8 A If they did I don't recall it.

9 Q Do you keep a record of telephone calls with the
10 home office in New York?

11 A No.

12 Q Or other messages generally?

13 A No.

14 Q Do you know Al Key?

15 A Yes.

16 Q Do you recall having telephone calls or messages
17 and discussions with him --

18 A No.

19 Q -- in the winter of 1969 --

20 MR. McALLISTER: Regarding what?

21 Q -- regarding Bartep Industries?

22 A No, I do not.

23 Q What was your telephone number. What is your number?

24 A My home number?

25 Q No, at the office.

1 A 563 3181.

2 Q I show you the back of Plaintiff's Exhibit 64,
3 and ask you if any of the handwriting, the telephone numbers
4 or anything else is familiar to you?

5 A The name at the top of the page is familiar.

6 Q That is yours. The numbers which might be
7 telephone numbers are not yours?

8 A They don't --

9 Q Are they at all familiar to you?

10 A No. We have sequence numbers. They start with 563 --

11 MR. McALLISTER: Do we have to be replete on the
12 record? Off the record.

13 (Discussion off the record.)

14 MR. HARRIS: On the record.

15 Q Do you have any knowledge, did you have any
16 knowledge in the winter of 1969 why New York did not want
17 to trade Bartep stock?

18 A I have no precise knowledge on the subject. I am
19 willing to give you an opinion, but I have no precise knowledge.

20 Q Upon what would your opinion be based?

21 A Upon my experience in the market.

22 Q All right. I would like your opinion based upon
23 your experience in the market why would New York not want
24 to trade Bartep?

25 A They would not want to execute this order because

1 they did not think that there was a fair market in the stock.

2 Q Referring to the 1000 share buy and sell?

3 A To the 1000 share buy and sell on Bartep.

4 Q You say not a fair market in the stock. Do you
5 mean the market would be too high or too low, or what?

6 A If there were only one dealer in the market nobody
7 knows what the stock is really worth. If there are 10 dealers
8 in the market and they are all fairly consistent you know
9 you have a fairly good market, but if you only have one it
10 is too easy to rig the market.

11 Q Even if two customers come into a brokerage firm
12 such as yours and one says I am long 3500 shares of Bartep
13 stock and you have it and I would like to sell 1000 at 5-1/4?

14 A Our firm will not do it unless they can relate
15 it to a known market.

16 Q Mr. Simpson, I call to your attention that orders
17 had gone up during January just before February 4th to sell
18 at 5, to sell 5 1/2, in fact on January 2nd Mr. Miller had
19 sold 500 at 5 and New York had executed the order -- Mr.
20 Rubino had sold 1000 shares in November at prices not too
21 much different than 6, in the \$6 range, Mr. Padula had bought
22 1000 at 4, Mr. Fisher in your Miami Beach office had bought
23 5000 at prices ranging from 5 to 7 and so on -- do you still
24 think that the reason New York did not want to trade on or
25 about February 7th in Bartep, February 6th and February 7th,

1 was because they could not relate it to a market?

2 A That could be one very good reason. There could
3 be other reasons.

4 Q In your experience as a stock broker what other
5 reasons could you think of?

6 A If they had trouble getting transfers and things
7 like that would be another reason.

8 Q Do you recall as a broker of some experience that
9 either verbal instructions to you or written instructions
10 emanate from the main office or NASD, instructions to the
11 effect that brokers should not take orders if they had
12 reason to believe that there would be difficulty in executing
13 transfers, difficulties in transfer agents, difficulties
14 in deliveries?

15 A I don't know of any rule like that.

16 Q But you just testified that one of the reasons
17 New York might not want to trade a security in general is
18 because they had experience or knew there would be
19 difficulty?

20 A In getting delivery or getting transfers or things
21 like this.

22 Q Do you recall in the winter of 1969 ever hearing
23 any rumors either from New York or from people down here
24 that Bartep might have some connection with a mob relating
25 to criminal elements?

* * *

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1 Q Do you recall that at all?

2 A I don't recall entering into the transfer of the
3 stock at all.

4 Q If when Mr. Hagstrom was still your Registered
5 Rep, or when Larry -- is Larry still with your firm?

6 A No.

7 Q If such a message had come from New York to any
8 personnel in your office to please contact somebody down
9 here in South Florida to get a release on stopped stock
10 would you sooner or later know of this occurrence?

11 MR. McALLISTER: Has it ever happened in your
12 experience?

13 THE WITNESS: Not to my knowledge.

14 MR. McALLISTER: Let's go on.

15 MR. HARRIS: What are you saying?

16 MR. McALLISTER: It never happened in his
17 experience. The man says that.

18 Q Mr. Bernard Miller's account, you give us 4000
19 shares, you affected a sale of 500 such shares through New
20 York, the stock was sent up there, something occurs, a
21 delay in transfer, I am suggesting that there may have been
22 a stop on the 4000 shares of stock in addition to the fact
23 it was in corporate form and in addition to the fact that a
24 corporate resolution has now been produced, a copy of a
25 corporate resolution has been produced that there may have

EXCERPTS FROM DEPOSITION OF JAMES J. SIMPSON ON MARCH 29, 1972

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1 have been a security stop on it.

2 A I have no way to prove or disprove that.

3 Q You have no recollection. Would it have been
4 brought to your attention in your local branch office if
5 New York had requested?

6 A Only in this form, it is not cleared legal.

7 Q If they wanted you to do something about it like
8 making a relatively local telephone call to Mr. Chester
9 Abney, the lawyer for the company, to please issue an
10 opinion to release the stop on the stock?

11 A I have no knowledge or recollection of anything
12 like that.

13 Q Do you have any recollection of anyone informing
14 you up to today that the shares delivered by Mr. Miller,
15 the Condor Insurance shares, upon transfer into the name
16 of Harris Upham had in fact been used to deliver shares
17 to Mr. Harold Fisher of the Miami Beach office?

18 A I had heard some hint of that today.

19 Q I mean before today?

20 A No, I don't.

21 MR. McALLISTER: These people like to get into
22 attorney work product.

23 A I don't know Mr. Fisher.

24 Q Did you have any telephone conversation with Mr.
25 Abney or Mr. Wittling or Mr. Yocom or anyone in that law

1 office during the month of August, 1969 relating to this
2 problem which is the substance of the letters in question?

3 A I believe that I had a phone call from Mr.
4 Wittling. I do not remember the substance of it, but I
5 know I could only have referred him to Mr. Long or to our
6 legal department.

7 Q Was that before or after this correspondence?

8 A This is about the time of this correspondence.

9 MR. HARRIS: The last item here -- Mr. Reporter,
10 could you mark this letter of August 22nd, addressed
11 to Mr. Simpson.

12 (Document above-referred to was marked
13 Plaintiff's Exhibit 124 for identification.)

14 MR. HARRIS: And mark this.

15 (Document above-referred to was marked
16 Plaintiff's Exhibit 125 for identification.)

17 Q Mr. Simpson, you are now looking at Exhibit 107,
18 which is a Telex message addressed to McCarthy in New York?

19 A Yes.

20 Q Signed by you?

21 A Signed by me.

22 Q Dated, when was it dated?

23 A August 8, 1969.

24 Q Does that message refresh your recollection about
25 any of the transactions in question?

A It does not bring out anything that I can state.

1 Q The substance of the message is that you were
2 inquiring who the transfer agent is for Bartep on the
3 certificates, is that correct?

4 A That is probably it. Yes.

5 Q Why would you want to know who the transfer agent
6 is in August, 1969?

7 A At this point I don't know.

8 Q I show you Exhibit 124, which is a letter
9 addressed by Mr. Long to you of August 22nd, and 125,
10 which is a letter from you to Mr. Long of August 27th. Now,
11 looking at Plaintiff's Exhibit 125 it says, "attached are --"

12 MR. McALLISTER: You don't have to read it.

13 Q Could you please tell us what were the papers
14 you attached and sent to New York?

15 A I have no idea. I really have no idea. These
16 things are routine with us to send them papers.

17 MR. HARRIS: Now, Mr. Harris, do you have the
18 original of this letter addressed to Mr. Scott Long
19 in New York.

20 MR. McALLISTER: I do not.

21 MR. HARRIS: Do you have the attached paper sent
22 to New York?

23 MR. McALLISTER: I do not. Unless they were
24 part of this document that was already produced.

25 THE WITNESS: Could it have been the release they

1 were referring to in this letter?

2 MR. HARRIS: No.

3 Q Mr. Simpson, I show you 124, a letter addressed
4 to you by Mr. Long of your main office and he clearly
5 states something about a stop transfer being removed; is
6 that correct?

7 A Yes.

8 Q And he is clearly referring to Mr. Bernard
9 Miller's account; is that correct?

10 A Right.

11 Q From your experience as a stock broker, and
12 assuming for the moment that the prior records reflect
13 that the Bernard Miller shares of Condor Insurance had in
14 fact been transferred into the name of Harris Upham by the
15 date of March 7, 1969, and had in fact been delivered to
16 Harris Upham by March 25, 1969, what do you make of this
17 letter?

18 MR. McALLISTER: If you know.

19 THE WITNESS: I don't.

20 MR. HARRIS: Just a moment. Not if you know.
21 From your experience as a stock broker, what do you
22 make of it?

23 A I don't know what to make of it. I have no way
24 to explain that. As I say, I have no control over activities
25 in New York.

EXCERPTS FROM DEPOSITION OF JAMES J. SIMPSON ON MARCH 29, 1972

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1 MR. HARRIS: I did not say that.

2 Q As a stock broker, your career in the securities
3 business, is there any explanation to your mind?

4 A No. I can't say.

5 Q I am now talking about Exhibit 125, which refers
6 to papers that Mr. Long requested you to send him regarding
7 Mr. Miller's account, is that correct -- you cannot
8 remember what those papers were?

9 A I am sorry. I cannot.

10 Q And from your experience and also participation
11 in this matter as the manager of the Harris Upham
12 Fort Lauderdale office can you explain or elaborate some-
13 what on what this agreement and release were that Abney,
14 Wittling and Yocum's firm gave your company in order to
15 obtain a release?

16 A I think I can give you an answer on that.

17 Q Do you have a copy of that agreement and release?

18 A No.

19 MR. McALLISTER: Counsel for the defendant does
20 and will not produce them.

21 MR. HARRIS: You do have copies of the agreement
22 and release?

23 MR. McALLISTER: Yes.

24 THE WITNESS: Mrs. Rubino, the widow of Gus
25 Rubino, made a separate agreement or agreement on their

1 own.

2 Q What was that agreement?

3 A Made an agreement between them and Bernard Miller,
4 the widow of Mr. Rubino, that they would cancel the trans-
5 action which had placed the shares of stock into the
6 possession of Mr. Miller, in the first place, and I really
7 don't remember the disposition of this.

8 Q Did you ever read that agreement and release?

9 A I think I have seen it, but I don't recall.

10 Q Did it refer to the consideration, and the
11 transaction, and circumstances in which Mr. Miller got the
12 shares initially from Mr. Rubino?

13 A I vaguely remember that he had sold them a boat
14 and the boat was returned and the stock was returned.

15 Q The boat was returned by whom, to Mr. Miller,
16 is that correct?

17 A Mrs. Rubino returned the yacht or boat, whatever
18 it was, and Bernard Miller returned to Mrs. --

19 Q You --

20 MR. McALLISTER: Let him finish. He has a right
21 to finish his answer, or I will close out the
22 examination.

23 A I am only telling you a generality, anyway. I
24 don't know the dates. I am just telling you what happened.

25 Q Did that agreement and release to your recollection

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

* * *

2

APPEARANCES (Continued):

GIFFORD, WOODY, CARTER & HAYS, ESQS.
Attorneys for Defendant
One Wall Street
New York, New York
by: MICHAEL J. McALLISTER, ESQ.
of Counsel

* * *

ALBERT LENOIR KEY, having been first
duly sworn, testified as follows:

EXAMINATION BY MR. FOLEY:

Q Mr. Key, are you employed by the defendant,
Harris, Upham?

A Yes, I am.

Q In what capacity?

A As a Vice-President.

Q For how long have you been employed by
the Company?

A Since '63.

Q In what department do you work now; what
area of the company?

A I am responsible for the administration of
a couple of branch offices. I am in charge of the
investment and management department, which I supervise,
and the over-the-counter department, which I supervise.

* * *

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

* * *

Key

10

1

2

Q From whom is this publication received?

3

A The SEC.

4

Q Do you receive any particular bulletins

5

or any notices involving compliance and rule changes of

6

various types in terms of the brokerage firm operation?

7

A I think most of the NASD stuff crosses my

8

desk. We get a lot of stuff.

9

Q When you say stuff, are you saying releases

10

from the NASD and various changes and from the Commission?

11

A Yes.

12

Q Prior to getting into some of the material

13

that I had in mind here, Mr. Key, I want to address myself

14

to one particular problem that has come up. It appears

15

that in the process of handling orders from Mr. Fisher,

16

a discrepancy amounting to seven hundred shares developed

17

that I think you are familiar with.

18

A Yes.

19

Q Can you tell me when you first became aware

20

of that seven hundred share discrepancy?

21

A When I talked to Mike the other day. I

22

didn't know about it.

23

Q Do you know what, if any, steps were taken

24

prior to February of 1969 to remedy that discrepancy?

25

MR. MC ALLISTER: Before you answer that

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

11

question --

MR. FOLEY: I don't like interruptions.

MR. MC ALLISTER: I will tell you why,
because any knowledge obviously from his answer,
the knowledge he got with regard to that came
from discussions with his attorney.

MR. FOLEY: I object to that. I strenuously
object to this because it involves a witness.
If that is so, the witness can say so.

MR. MC ALLISTER: I object on the grounds
it involves the attorney-client privilege.

MR. FOLEY: I asked for a period of time
prior to February of '69. There was no privilege
at that point.

MR. MC ALLISTER: He just told you the first
time he heard about it was in a discussion with
his attorney.

MR. FOLEY: I am ready to proceed.

THE SPECIAL MASTER: Let's go back and
let me hear your question again. I do recall his
answer was he knew nothing about it until he talked
to Mike, meaning Mr. McAllister, counsel for Harris,
Upham, within the last few days.

MR. FOLEY: That is correct.

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Key

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THE SPECIAL MASTER: May I have the question?

3

(Record read.)

4

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MR. FOLEY: That could be something he
learned at any particular time. I am asking
about what steps were taken then, if he knows of
any taken by anybody.

8

9

10

11

12

THE SPECIAL MASTER: You are faced with the
problem he said he doesn't know anything until
such time as he talked with Mr. McAllister. You
are free to inquire as to what knowledge he has
besides that.

13

14

15

16

MR. MC ALLISTER: May I instruct the witness,
then, on the record that any knowledge you acquired
from me you are not to divulge to Mr. Foley in
this answer.

17

18

19

20

MR. HARRIS: He is not his client.

MR. MC ALLISTER: Do you want to make the
objection to Mr. Galgay? I will argue that. I
will brief it for you.

21

22

MR. FOLEY: Where do we stand? Do we have
to get a ruling on it?

23

24

25

MR. MC ALLISTER: I have just instructed
the client. Apparently the instruction accords
with Mr. Galgay's understanding. In other words,

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
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Key

13

the witness is only permitted to respond to that knowledge other than what he got from me.

THE SPECIAL MASTER: I will let you pursue other avenues rather than trying to deal with what Mr. McAllister told the client.

Q To complete the line of questioning, are you aware of any steps taken by anybody at Harris, Upham prior to February 17, 1969, to clear up this discrepancy, and if any such knowledge is being held pursuant to the instructions you received from your attorney, say you have such knowledge and you don't have to give it to me. If there is other knowledge you have you didn't get from Mr. McAllister, state it on the record.

A No, I have no knowledge of the seven hundred shares.

Q Or of the procedures taken to remedy it?

A Or of the procedures taken to do something about it.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q Mr. Key, you are aware, of course, that this action, this lawsuit, involves an order placed by Mr. Fisher in the Florida office, the Miami office, for shares of Bartep Industries?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 14

2 A Yes.

3 Q You are familiar with that name -- Bartep?

4 A I am.

5 Q Can you tell me when you first became

6 involved with any shares of Bartep, or any orders

7 respecting it?

8 A I can't give you a specific date, no. I

9 remember Bartep and the problems, but a specific date as to

10 when I got involved, no, I couldn't.

11 Q For your information, and I would like to

12 give you this to see if it would help your recollection

13 at all, the particular order which is the subject of this

14 lawsuit was placed in late October of 1968, and on

15 February 17, 1969, a telegram was sent from the customer

16 to Harris, Upham, instructing Harris, Upham to cancel

17 the sale. You are aware of that?

18 A Yes.

19 Q Do you know whether you had anything to do

20 with Bartep prior to the time that Mr. Fisher made his

21 purchase in October of 1968?

22 A I can't honestly say that I do, no. I am

23 unclear in my own mind as to when I became involved in it.

24 Q Apart from when, do you have a recollection

25 of the circumstances under which you first became

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Key

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involved in it?

A Yes. I remember we turned Fisher down when he tried to cancel the trade.

Q Was that after the February 17 telegram that he sent?

A I believe it was, yes.

Q Prior to this deposition have you examined -- without telling me what you looked at -- documents and files and had discussions for purposes of refreshing your recollection so that you could come here informed?

A Yes.

Q On the basis of that reflection and the documents and discussions you had that you either viewed or participated in, your best recollection now is that the earliest involvement you had with Bartep Industries shares was after the receipt of Fisher's telegram of February 17th?

A No. You see, chronologically, I get screwed up on this. I could have heard about it before that.

Q Did you have any other circumstance involving Bartep at about the same time or some time back around then that may have occurred before?

A There was a lot going on in the stock at the time -- not a lot, but there was that other -- well,

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KEY, ON APRIL 17, 1972

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Key

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again, I saw that as a result of my talk with Mr. McAllister. But the Fort Lauderdale thing -- is this what you are talking about?

5

Q We are talking about various activities.

6

I am not striving at any one. I am striving for information, rather than trying to go in one direction. By the Fort Lauderdale thing, can you say what you are referring to there?

9

10

A I think it is that one thousand share

11

pair-off, as I recall, the thousand share cross in the Lauderdale office we turned down, or that we wouldn't trade in.

13

14

MR. FOLEY: Off the record.

15

(Discussion off the record.)

16

Q Have you had occasion in preparation for

17

your testimony today to look over the documentation on this pair-off you are talking about?

18

19

A Yes.

20

Q I know Exhibits 117 and 118 are time-stamped for February 4, 1969.

21

22

A That's your answer, then.

23

Q Right. Do you know whether prior to that

24

you had any contact with Bartep?

25

A Again, maybe you can refresh my memory.

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KEY, ON APRIL 17, 1972

* * *

Key

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2 A Yes. I might also have feelings as to
3 whether you could trade with a firm or not. There are the
4 good ones and the bad ones.

5 Q Talking about again about February of 1969,
6 do you recall ever receiving information that there were
7 one or more houses making a market in Bartep, but they
8 were houses with which you would not do business?

9 A Yes.

10 Q Do you recall anything about that?

11 A Yes. There was Wesco.

12 Q What is the story with Wesco?

13 A I would argue with you whether they would
14 make a market.

15 Q Don't argue with me. Just tell me.

16 A I wouldn't argue the point, I mean, whether
17 they made a market in the first place.

18 Q What were the facts? Tell us what the
19 problem was.

20 A All I can tell you is that Wesco was not,
21 as I recall, a good firm with whom one could do business,
22 and I can't say anything more, because I have thought on
23 this point. I have a vague recollection we had a problem
24 with them somewhere else in the distant past, which I
25 cannot determine. But as I recall, I was told that Wesco

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
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1 Key 24
2 had a lousy reputation and I didn't want to do business
3 with them. At least this is what was told to me by the
4 over-the-counter department. I had no direct dealings
5 with Wesco myself.

6 Q Would you just normally take their word for
7 it, that their reputation was such and so, or would you
8 ask for some verification about that?

9 A I don't recall that I did ask for verifica-
10 tion.

11 Q What would your normal practice be in a situa-
12 tion like that?

13 A If we didn't want to deal with a company?

14 Q No. If somebody in the over-the-counter
15 department tells you some particular broker dealer has
16 a bad reputation, would you just stop there and say very
17 well, that is all I need to know, or would you ask for
18 more?

19 A I wouldn't go to anybody else, I think.
20 I would take my head of the over-the-counter department's
21 say-so.

22 Q Would you ask him what is the problem with
23 the company?

24 A Yes, sure.

25 Q Do you recall doing that in this instance?

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KEY, ON APRIL 17, 1972

Key

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2 A I do not.

3 Q Do you know who made a decision not to deal
4 with Wesco?

5 A Again, I think you asked that before, and
6 I think I said I would be the guy who would be responsible
7 for the decision, and that is true. But if I can speci-
8 fically remember that I said absolutely no to Wesco, you
9 know, I couldn't say positively. I don't know what else I
10 can say.

11 Q At this particular time, then, was the
12 problem Bartep or Wesco, or both?

13 MR. MC ALLISTER: I am going to make one
14 comment on the record.

15 MR. FOLEY: I don't care for comments on
16 the record.

17 MR. MC ALLISTER: You are misconstruing the
18 record, and that is why, because there is no
19 refusal to trade with Wesco in the record here.

20 THE SPECIAL MASTER: Why don't you object
21 to the line of questioning rather than get into a
22 discussion?

23 MR. MC ALLISTER: I object to the form of
24 the line of questioning, because there is implicit
25 in his questions that there was a refusal to trade

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KEY, ON APRIL 17, 1972

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Key

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with Wesco. There is no record here, to my knowledge, that there was a refusal to trade with Wesco.

3

4

5

THE SPECIAL MASTER: You are objecting and you are putting into the objection the complete statement.

6

7

8

MR. FOLEY: This is what I don't like.

9

10

11

12

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While we are on the record, I am going to make a statement about that. I hate to be abrasive, but I must say that I do not recall ever a series of depositions in a case in my life where there was quite so much of that before. I really feel not just an objection or a comment relating to this particular event now, but this has been characteristic of the case, and I think it is something that ought to be avoided at all costs.

18

19

20

21

22

23

THE SPECIAL MASTER: If you will shorten your colloquy, let's all get back on line. If you have an objection to state, state the objection and the grounds with the minimum amount of colloquy. That will cut down the expense of the record as well as the abrasiveness referred to.

24

25

MR. MC ALLISTER: I have an objection pending, I believe.

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Key

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MR. FOLEY: We have a standing question.

(Question read: "Q At this particular time, then, was the problem Bartep or Wesco, or both?")

THE SPECIAL MASTER: I will allow the question.

A It must have been both.

Q If I may in the form of a question just say something here, "must" in a sense is not responsive. If you don't know, you don't know. If you do know, you do know. When you get must and maybe and perhaps -- this is not criticism -- and you read it later on in a record like this, it is not very helpful, and you know I am looking for something helpful.

A Again, I really am trying to be helpful. I am not trying to avoid these things you ask me. But if I can specifically remember these instances, then I will say I specifically remember them.

MR. MC ALLISTER: What he is saying to you is if you can't specifically recall, say so.

Q Say so.

A I can't specifically recall.

Q Do I take it from your answer that you have an impression there was some kind of difficulty both with

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KEY, ON APRIL 17, 1972

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Key

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respect to Wesco and Bartep in the beginning of February
of 1969?

3

4

A Yes.

5

Q And do I also understand it to be your

6

impression that as regards Bartep, the only difficulty

7

you had at that point was the unavailability of a market?

8

A Yes, the unavailability of a market would

9

have been a very good reason for turning that order down.

10

Q Is it your recollection that this in fact

11

was the only problem you had with Bartep? If you have

12

any others, tell us about it.

13

A I don't have a recollection that that was

14

the only reason, no. That would have been the reason.

15

Q Do you know if there was any other problem?

16

A Of course there are other problems, but

17

chronologically, where do they fit in?

18

Q In early February, prior to the cancellation

19

by Fisher, and I am thinking of the dates February 4th,

20

5th, 6th and 7th of 1969, do you know of any other problem

21

with Bartep, other than the fact that apparently there

22

was no market available?

23

A I can't honestly say that I do know.

24

Q Have you ever personally checked the pink

25

sheets to see what the status of Bartep was for that

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KEY, ON APRIL 17, 1972

Key

29

period of time?

A I have not, no.

Q You don't know, then, if there were any other broker dealers?

A I thought you meant did I check in the last couple of days.

Q No. Did you check during that period of time to see if anybody else was making a market?

A No.

Q Do you quite often check the pink sheets?

A Quite often. I have a set in my office.

Q You keep the daily sheets, I take it; is that right? You don't keep back issues?

A I keep a set for about a week and then get a new one. I don't need fresh quotes. I just keep it for reference.

MR. FOLEY: Off the record.

(Discussion off the record.)

Q I would like to show you some exhibits here. We have Exhibit 63, 64 and 61. Viewing these, together with that pair-off order I showed you a few minutes ago --

MR. MC ALLISTER: I don't believe you showed it to him, Mr. Foley.

Q Do you have a recollection now of these par-

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KEY, ON APRIL 17, 1972

1 Key 30

2 ticular transactions -- which incidentally reflect that
3 between the period of February 4, 1969 and February 7,
4 1969 you turned down at least three trades and one pair-
5 off; is that correct?

6 A I see two here.

7 Q I gave you another one.

8 MR. MC ALLISTER: I will object to the
9 form of the question.

10 Repeat the question, please.

11 (Question read.)

12 A Three trades and one pair-off. I see the
13 pair-off here.

14 Q Do you see these three exhibits here --
15 61, 63 and 64? They are different dates, are they not?

16 A These would go with this, wouldn't they?

17 Q Would they?

18 MR. MC ALLISTER: There is a date on the
19 exhibits. That might refresh your recollection.

20 A February 6 and 7th. What is the date here?

21 Q February 4th.

22 A You are saying that these are separate trades
23 from these?

24 Q I am not. I am asking you.

25 THE SPECIAL MASTER: The question is do you

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KEY, ON APRIL 17, 1972

1 Key 31

2 have a recollection of those trades, having seen

3 these documents.

4 Q Do you have a recollection?

5 A I would say I have a recollection of these

6 two here, of the pair-off. I don't have a recollection

7 of any more.

8 Q Do you see here you have Exhibits 61 and

9 63?

10 A Yes.

11 Q Do you know what the dates are on there?

12 A Yes.

13 Q Both refer to orders entered that day,

14 right?

15 A They could have.

16 Q Don't they on their face?

17 A It doesn't even say there is an order.

18 Q Do you see this?

19 A "Entered today." Right.

20 Q "Turning down the orders entered today" on

21 both of them. Right?

22 A Yes.

23 Q That is why I am saying I am referring to

24 different ones there.

25 A I see, yes.

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

32

2

Q Do you have any recollection of these

3

transactions, of these at all?

4

A No. I have a recollection of these, the

5

pair-off.

6

Q But the others you don't have a recollection

7

of?

8

A No. I think they are the same thing.

9

Q Is that your handwriting on No. 63?

10

A Yes, it is.

11

Q How about on No. 64; is that your handwriting,

12

also?

13

A Yes.

14

Q And on No. 61, which is the Telex, did you

15

send that?

16

A I have no recollection. I send these out

17

across. The secretary from my office takes them out

18

and deposits them.

19

Q How about 61, the Telex? Is this from you

20

to somebody?

21

A It looks like from me to Bob Mallett --

22

R.M.

23

Q Can you tell us on No. 61, after stating

24

there is no market here or elsewhere, do you have any-

25

thing new on it, what does that refer to? What was the

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KEY, ON APRIL 17, 1972

Key

33

1
2 dialogue between you and Mallett at that point?

3 A I honestly can't recall. But he must have
4 been -- again, I don't want to surmise; but he must have
5 been in touch with me on it, or he must have been talking
6 to me about it. I don't even recall having put that on
7 there. Maybe I did, too.

8 Q On No. 64, the statement is there, "We do
9 not wish to trade this stock even if Wesco is making a
10 market."

11 A Yes.

12 Q Does that refresh your recollection at
13 all as to whether or not you were having a particular
14 problem with this stock at this time, apart from the
15 market question?

16 A I would say we must have been having trouble
17 with it.

18 Q An additional problem over and above the
19 question of availability of a market?

20 A That's difficult to say. We were having
21 difficulty with the market, I know that. If I can
22 establish these things chronologically for myself and
23 for you, maybe we would have the answer. But I don't
24 seem to be able to. I can't say for sure, you know, that
25 we were aware of other problems as well. We were aware

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KEY, ON APRIL 17, 1972

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Key

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of the fact that there was no market in it, and we

3

were aware of the fact that we don't like to cross trade

4

in branch offices, anyway, or cross trades particularly

5

if there is no market, a wash trade.

6

Q Is there a rule in the company against

7

pair-offs?

8

A Well, I think there is a rule against wash

9

trades.

10

Q There is?

11

A Yes. We don't allow wash trades.

12

Q Would you define a wash trade?

13

A Well, I am not an expert, but I will try

14

and give you a definition. It is somebody who makes a

15

trade usually to establish a tax loss, or a tax gain,

16

but which is not one that would stand up if the IRS got

17

into the picture. In other words, he sells it to his

18

wife and then takes it back. That would be a wash trade.

19

Q Can you tell us what that had to do with the

20

trade between Padula and Miller here that is reflected

21

on Exhibits 117 and 118?

22

A Well, they could have been in cahoots for

23

all I know.

24

Q Did you know?

25

A I don't know.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

* * *

Key

46

1 this situation continued during which there was an unavail-
2 able market for Bartep?

3 A No, I don't, except that there was no
4 market available at the time.

5 Q After Mr. Fisher made his purchase in October
6 of 1968, can you tell us whether or not during the
7 balance of 1968 or in January of 1969 you became aware of
8 that order or of any problems in relation to it?

9 A I can't say, no.

10 Q During this period of time did you ever
11 become aware of any delay in effecting transfer of Bartep
12 securities?

13 A What period are you talking about?

14 Q I am talking once again from October of '68
15 through the end of January of '69.

16 A I don't think so. I don't believe I did.

17 Q Do you know Mr. Bill Smythe?

18 A Yes.

19 Q Did he ever draw to your attention during
20 that period, from late October through the end of January,
21 late October of '68 to late January of '69, any delay or
22 difficulty he was encountering in effecting a transfer
23 of Bartep shares?

24 A I can't remember, first of all. But in the
25 SCHON-GREWER

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 47
2 general course of business he wouldn't come to me with a
3 problem of that sort.
4 Q To whom would he go?
5 A The back office. It is a back office cage
6 problem. He would go to Arthur Otten with it.
7 Q During this period of time did you receive
8 any communication at all, oral or written, from any branch
9 with respect to customer complaints arising out of failure
10 to get transfer of Bartep shares?
11 A Not that I can recall, no.
12 Q Did you ever discuss it with Mr. Mallett?
13 A Have I ever discussed Bartep with
14 Mr. Mallett?
15 Q During this period of time.
16 A No, not that I recall.
17 Q Have you ever had any discussion with a
18 registered rep named Cowan about it?
19 A No. I didn't have any dealings with him
20 whatsoever.
21 Q After the period that we were discussing,
22 February 4 through February 7, did you or anybody acting
23 under your instructions make any further inquiries
24 about Bartep or the availability of a market or anything
25 else about it?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 19721
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25

Key

48

A You mean did I or anybody else?

Q Yes, anybody acting under your instructions.

A No, I would think not.

Q Do you have any recollection of ever receiving any information that would respond to your request in No. 61 as to whether anybody had anything new on Bartep?

A No. Of course, I think I know what your line of questioning is.

MR. MC ALLISTER: No.

A Then the answer is no. In my own mind, I am unclear as to any other reasons at that time.

Q Did you become aware about the second week of February, 1969, of any instructions to ship stock to a bank from Mr. Fisher?

A If you are asking me whether I can remember that specifically coming in, I don't know whether it was the second week in February or the third week in February.

Q It is Exhibits 69-A and 69-B. I ask you if you have any acquaintance with that.

A No.

Q At the time did you know anything about the business of shipping these shares to the Commercial Bank?

A When I say no, I have never seen this before.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

49

2

Q However, does it refresh your recollection as

3

to the event?

4

A No.

5

Q I would like to show you Exhibit 70-A and

6

70-B and ask you now whether on the basis particularly

7

with respect to 70-A whether that refreshes your recollec-

8

tion as to difficulties with Bartep that you had been

9

informed of prior to February 17th.

10

A No, it doesn't.

11

Q Do you draw a blank on this exhibit, too?

12

A Yes, pretty much.

13

Q Tell me, when you get a telegram from the

14

manager of a branch office who says there is something

15

about a certain stock and he doesn't like the things he

16

hears about it, is that enough, in the normal course of

17

events, to put you on inquiry as to what is wrong here?

18

A Certainly.

19

Q The normal thing for you, then, would be

20

to regard that as a red flag. You got to inquire about

21

it, is that right?

22

A Yes.

23

Q Do you recall doing so in this instance?

24

A I do not recall doing so in this instance.

25

Q Is that your handwriting on 70-B?

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KEY, ON APRIL 17, 1972

Key

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A Yes.

Q Do you know anything about that? I may add 70-A and 70-B were stapled together. That may be of assistance to you.

A What did you want to know about it?

Q Do you recall writing that?

A Well, yes, this is my writing.

Q But do you recall doing it? Can you tell us anything about it?

A I can only assume what I was doing. I don't know whether that is something I should talk to you about. If you are talking about a recollection --

Q Let's talk about a recollection. We will get on to assumptions later on.

A If we are talking about recollections, I have to be truthful. I don't.

Q As to an assumption, if you had to make an assumption, would that assumption be on the basis of the way you normally do your business? In other words, as a business matter, when you make an assumption, do you make an assumption on the way you do things on a day by day basis?

A Yes.

Q On that basis, will you tell us what your

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Key

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1
2 assumption is?

3 A The writing on the top of 70-B would be
4 a procedure which I could pursue where I would look at
5 the stock record upstairs in the cage department to
6 determine what is in transfer, what is in the box, and
7 what is in fail.

8 Q Is that your handwriting?

9 A Yes, it is.

10 Q That would be because you would have person-
11 ally gone to check what the transfer status is in this
12 Bartep, when you got the message?

13 A I might have called Bill Smythe and asked
14 him, because he could check it upstairs, or I would have
15 gone up myself.

16 Q How about the writing at the bottom of that 70-B,
17 "Seven hundred in vault ledger stock floating around,"
18 et cetera? Is that your handwriting down at the bottom
19 of the page?

20 A Yes.

21 Q Do you see the word "restricted" underlined?

22 A Yes.

23 Q You wrote that?

24 A Yes.

25 Q Can you tell us by that did you mean that

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Key

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1 when you wrote that you were aware that there was some
2 restriction on some stock?
3

4 A I don't know. It could have been a
5 restriction on the company. I just don't know.

6 Q It was a restriction on something, is that
7 right?

8 A Yes, I would say so. Wouldn't you?

9 Q Do you recall writing it?

10 A Yes, I recall writing it.

11 Q Can you tell us why you wrote it or what
12 was going on then?

13 A No, I can't.

14 Q Can you tell us what did you mean by "Is
15 it good"? What were you referring to?

16 A I would say it refers to ledger stock
17 floating around, is it good.

18 Q Would --

19 THE SPECIAL MASTER: Did you say ledger
20 stock or letter stock?

21 THE WITNESS: Ledger. That is what I have
22 written there.

23 Q Would you say the reference to something
24 being restricted referred to the stock, also?

25 A It certainly could.

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Q Do you have any recollection as to whether

3

or not any of this refers to a problem of the company

4

Bartep as opposed to particular securities?

5

A No, I can't at this particular juncture

6

state that; no.

7

Q As to your reaction, I take it, then, on

8

the basis of once again your knowledge of how you function,

9

am I correct in surmising that that reaction refers to

10

some sort of restriction or other on the Bartep ledger

11

shares that you had floating around?

12

A Yes.

13

Q When you put down "Is it good?" with a

14

question mark, that would indicate you had some doubt in

15

your mind or you had some inquiry in your mind about the

16

validity of the shares?

17

A Yes.

18

Q Could you tell us what did you do to find

19

out if they were good?

20

A No.

21

Q Do you know if you did anything?

22

A No.

23

Q Would you do anything?

24

A In my normal line of work, if there was

25

ledger stock floating around, that would be the problem

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of the cage to take care of.

3

Q When you see a problem, do you communicate

4

that problem to somebody.

5

A I may well have.

6

Q Would you normally?

7

A Yes, I think I would pursue it. Somebody

8

else would have to come in. I would ask Bill Smythe and

9

ask him what the story is.

10

Q Whatever it is, whatever you found, you

11

don't remember what you found. But you have written

12

here you found something that tells you there is a

13

problem, and the only place you would look would be in

14

your own records.

15

A Yes. But you are asking me for a true

16

recollection and I can't recollect who I went to or

17

who I talked to.

18

Q But to the extent that you can, I would

19

like to know that. On an occasion when you don't have

20

a recollection, I am going to try and explore the area

21

by making some inquiries about it. When you say you do,

22

I will ask what would your normal practice be. We will

23

try to distinguish those two as we go along.

24

THE SPECIAL MASTER: I would like to make

25

an inquiry on my own. When was the last time you

SCHON-GREWER

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1 know that. If there is ledger stock floating around
2 and if there is restricting, in one fashion or another,
3 or whether it is good, usually the compliance department
4 gets into it here, and that would be one of the normal
5 procedures that I would follow when finding out about
6 something like that.
7

8 Q Once again, would this be a normal procedure
9 at Harris, Upham to inform your compliance department that
10 there is an apparent difficulty of some sort here?

11 A Yes.

12 Q Can you tell us this. On the basis of your
13 viewing this exhibit now, what do you think would be the
14 particular compliance problem that would concern you
15 at that point?

16 A By just looking at this thing here?

17 Q Yes.

18 A Probably a letter stock, or ledger stock,
19 that it's not good delivery.

20 Q Can you state whether or not you knew then,
21 when you are talking about ledger stock floating around,
22 there were transfer problems in the stock?

23 A I can't honestly say that I did, no.

24 Q Would you consider it the obligation of the
25 people who are handling the stock in the cage and who saw

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the same things that you saw that led you to make these
notations on the exhibit to inform the compliance depart-
ment?

3

4

5

A You mean would the cage inform the compliance
department?

6

7

Q Whoever was handling the materials that you
reviewed before you made these notations.

8

9

A I would think that any time something like
this develops, the compliance department would be called
on.

10

11

12

Q Do you know whether or not the compliance
department was called on?

13

14

A At this particular time I don't remember.
I think it could be an assumption, yes.

15

16

Q What would the compliance department do
about it?

17

18

A I think they would try and determine what
the problem was, whether you could make delivery of the
stock or you couldn't make delivery of it, or what the
problems were.

19

20

Q Am I correct in my assumption that the
function of a compliance department is to see whether or
not the company is functioning properly in terms of its
legal obligations under the rules and regulations of the

21

22

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Key

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various governing authorities?

A Yes.

Q When you would contact the compliance department or anybody would contact the compliance department about a problem such as this, would it be, then, to determine there existed in fact or a danger of some violation of some rule in terms of the way this stock was being handled at this time?

A I would think so, yes.

Q Then the purpose for sending the inquiry to the compliance department was so that sufficient inquiry and discovery could be made by them to determine whether or not there was a transfer problem or other problem which could lead to a difficulty in terms of compliance with the relevant rules and regulations?

A Yes, I think that is a fair statement.

Q When you send an inquiry such as that to your compliance department, is it normally sent by any accompanying memorandum or note?

A You are assuming I did and I am not sure that I did.

Q I am just asking you now your practice.

A No. I usually just call them up on the telephone.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
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Q Do you follow it up afterwards in any way,
or does anybody follow it up?

A Yes. I follow it up until it is disposed
of.

Q Somebody would do that, though. They
would follow it up with the compliance department until
the problem is resolved?

A Yes.

Q Would that involve a series of either
oral or written communications between that individual
and the compliance department?

A Yes, of course.

Q Would any written record be made by either
anybody involved in the compliance department or the
person dealing with them?

A I can only speak for myself, and in that
case I don't keep a written record, no. In this instance
I kept a lot of stuff.

Q Do you know whether or not the compliance
department would keep any records it made to clear up
the violations that existed?

A They might. You would have to ask them.
I don't know what records they keep on these things..

MR. FOLEY: Mr. McAllister, I would like
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2 to ask you this, whether or not a search has been made.
3 Has a search been made for any such records to show
4 whether or not they existed, and if anything was done
5 about the compliance problem on this stock?

6 MR. MC ALLISTER: A search was not made,
7 of the compliance department per se. There is
8 nothing in any documents that we have seen or
9 produced that would indicate the compliance
10 department was involved in this matter. For that
11 reason there was no search made of the compliance
12 department.

13 THE SPECIAL MASTER: Under what section
14 of your demand for documents would you say this
15 was required?

16 MR. FOLEY: I would have to review that,
17 frankly. I would say this much, that whether or
18 not it was included in the Rule 34 request for
19 documents, my inclination would be to ask for
20 production of it even at this late date, inasmuch
21 as it is something quite candidly I very probably
22 did not suspect or had no reason to suspect myself
23 at an earlier time.

24 THE SPECIAL MASTER: Perhaps you would want
25 to reflect to see whether or not your existing

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Key

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2 demand was broad enough to cover this. I only
3 raise it for my own benefit at this point.

4 MR. MC ALLISTER: Off the record.

5 (Discussion off the record.)

6 Q Can you tell us, what do you mean by the
7 expression "ledger stock floating around"?

8 A I don't recall in this instance what is
9 meant. I mean by stock floating around maybe there is
10 bad stock in the area, or maybe there is poor delivery.
11 When you buy or sell a stock, you just don't know whether
12 it is good or not.

13 Q When you say floating around, does that refer
14 to the fact that something other than ordinary is
15 happening with respect to the stock?

16 A Yes, sure.

17 Q That there is some problem.

18 A Yes.

19 Q It doesn't necessarily define what the
20 problem is, but there is something or other?

21 A Yes.

22 Q I note that you referred to questions of
23 delivery as a possibility. Would the expression "floating
24 around" indicate to you that the difficulty that does
25 exist is in the delivery or transfer area?

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Key

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A It would seem to indicate that to me, yes.

Q Does the reference to ledger stock in particular have any significance?

A Not really. You mean as a definition?

Q No; here.

A I would say it was either ledger stock or control stock or letter stock, or something. Maybe I should have said legend stock or letter, instead of ledger.

Q By ledger stock, are you referring to shares there that are in house name, or something like that?

A No. I don't know. Maybe I was, but I don't have any recollection.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q Pursuant to our off-the-record discussion, Mr. Key, starting at the upper left-hand corner, the third item written in there, do I understand you are talking about twelve hundred fifty they failed -- t-h-e-y?

A They failed. I would assume that is what I meant, yes.

Q And going back to the lower right-hand corner, what would you describe as what you wrote here, ledger

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Key

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1
2 stock?

3 A Legend or letter, I would assume it is.

4 Q In other words, you are not referring to
5 ledger. That was a wrong choice of word?

6 A Yes.

7 Q You are referring to letter stock or legend
8 stock?

9 A Yes; stock that had a problem attached to
10 it.

11 MR. FOLEY: Off the record.

12 (Discussion off the record.)

13 MR. FOLEY: We have agreed, Mr. McAllister
14 and I, that a search would be made to produce
15 any documents relevant to work done by people
16 involved in compliance work at Harris, Upham
17 relative to the problems of Bartep shares.

18 MR. MC ALLISTER: It is agreed by counsel
19 for the defendant to make that search.

20 Q I would like to show you Exhibit 71. Does
21 this refresh your recollection? This is once again
22 February 14th, and here is Mr. Mallett down in Florida
23 sending you an inquiry, "Are you working on Bartep".

24 A What did the other one say?

25 Q The other one said he didn't like the things
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KEY, ON APRIL 17, 1972

1

Key

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he heard about it and he wanted certificates. I will
show you No. 70-B again.

3

4

A "I don't like the things I hear."

5

Q Here is one the same date. What was he
pushing for here?

6

7

A You better ask Bob Mallett. I have seen
these before and I honestly can't give you a firm
recollection of what transpired. It seemed to me Bob
was in trouble down there and he was trying to get
New York to bail him out, probably. What his problem
was, I can't specifically say.

10

11

12

13

Q When you look at these two exhibits here,
that is your instantaneous reaction, that something is
wrong and he is looking to get help?

14

15

16

A Yes.

17

Q Can you state whether or not these messages
were sent to you?

18

19

A I would say this one was because it has my
writing on it (indicating). It was addressed to me.

20

21

MR. MC ALLISTER: Referring to Exhibit

22

71.

23

A On Exhibit 71, I recollect having gotten it.

24

Q Was Mallett at this period of time in the
practice of constantly staying in touch with you about

25

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Key

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particular problems? Was he noteworthy in that respect?

3

A Yes. He is kind of a cry-baby.

4

Q Were you accustomed to getting Telexes such as these from various branch managers?

5

6

A Not accustomed to it, but it certainly is not unusual, no.

7

8

Q It happens every now and again, though; is that right?

9

10

A Right.

11

Q Would you say that one problem a day along

12

those lines is kind of a lot? In other words, I am

13

making some inquiry about the frequency with which you

14

would get these problems.

15

A Well, I would say more often.

16

Q In other words, there was something a little

17

different about these two exhibits here, an indication

18

that there was something out of the ordinary going on?

19

Once again, I am referring to Exhibits 70-B and 71.

20

A Yes.

21

Q On February 17 do you recall the receipt

22

of the telegram from Mr. Fisher instructing cancellation

23

of the sale?

24

A No, I can't recall having received it.

25

Q I would like to show you these two, Exhibits

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

66

75 and 76. Looking at No. 76, you will note that it is early in the morning, 9:45.

A Yes.

Q Can you relate that to any former one or what you were responding to?

A No.

Q Do you recall now receiving information about Mr. Fisher's desire to cancel?

A I can't specifically recall it, but I would assume that this was about the time.

Q You heard about it some time?

A Sure I did.

Q For your information, my best recollection is that these do not refer to each other. 76 preceded receipt of the telegram from Fisher. I just didn't want to mislead you on that.

A You mean this one came first (indicating)?

Q Yes. The other one doesn't have a time-stamp on it. I was going to ask you when you sent it out, if you can tell us.

A No, I couldn't tell you.

Q Going back to this question of the restrictions that you found on that stock, I would like to show you a few exhibits and see if they refresh your

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KEY, ON APRIL 17, 1972

Key

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1
2 recollection. We are looking now at Exhibits 39, 43 and
3 48. When you were looking through the records which led
4 you to question these Bartep securities, do you recall
5 seeing these?

6 A No.

7 Q Do you recall speaking with anybody else
8 about it?

9 A About what?

10 Q About the problem you found on the shares,
11 such as Scott Long or Bill Smythe or anybody else?

12 A Are you talking about anybody else?

13 Q Anybody at all.

14 A Well, I think I spoke to -- I can remember
15 speaking to Scott Long about it.

16 Q Can you tell us what the substance of that
17 conversation was, not verbatim; what he said to you and
18 what you said to him?

19 MR. MC ALLISTER: Can we have a time on it?

20 MR. FOLEY: It is up to him. Whenever it
21 was.

22 THE SPECIAL MASTER: Do the best you can in
23 fixing a date as to the conversation.

24 A I would say it was subsequent to -- well,
25 it says here, "We have received wire from customer asking

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

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us to cancel his purchase."

MR. MC ALLISTER: Referring to what?

MR. FOLEY: To 75.

A I would say about that time or subsequent to that I would talk to Scott Long.

Q The prior Telex on which you made your notations indicating a problem existed is dated February 14th, No. 70-B.

A I could have written that at any time.

Q The point of the matter is we are trying to pin out when you did in relation to when you received the information about the customer's desire to cancel.

A I can't help you on that point. This is probably what I acted on with Scott Long.

THE SPECIAL MASTER: He is referring to 75.

Q I asked you awhile ago, though, did you have any discussion with anybody about the information that you have noted in the right-hand corner of Exhibit 70-B.

A I have no recollection. All I can do is assume, and I really don't want to do that.

Q You say you had a conversation, however, with Scott Long, but that was not with relation to this

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KEY, ON APRIL 17, 1972

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problem, but rather with the --

3

A I don't know. You asked me who I would go

4

to if I had information like this.

5

Q That was another question. I am asking

6

you now the question where the name Scott Long came up

7

a little while ago.

8

A You asked me about the letter stock, if I

9

had a problem with it, and I said I would go to Scott

10

Long, as I remember.

11

Q Let's recap the thing. I am asking you now,

12

in relation to the information contained on the annotations

13

that you have made on 70-B, did you have any discussion

14

with Scott Long or anybody else about this particular

15

problem?

16

A When?

17

Q At any time after you received this informa-

18

tion.

19

A I would say I don't remember. I can't.

20

All I can do is look at these things and surmise. The

21

only time I could have talked to Scott would be after we

22

received this thing here.

23

Q Can you tell me, then, why do you assume

24

that you would not talk to him until after you received

25

that, even though you may have received the other informa-

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KEY, ON APRIL 17, 1972

Key

70

1
2 tion which is annotated on 70-B?

3 A I could have gone to him here, I could have
4 gone to him here. That's as much as I can establish.
5 I don't remember.

6 Q Is your testimony this, that regardless of
7 when you made these annotations on 70-B, you didn't talk
8 to Scott Long about it until after receiving the cancella-
9 tion order?

10 A I just don't know, but I don't want you to
11 assume that I did.

12 Q I am trying to verify this. I am trying to
13 pin this down.

14 A No, I can't pin it down myself, I am sure,
15 so it would be satisfactory to you.

16 Q Is there every bit as much possibility,
17 then, that you had a discussion with Scott Long about the
18 material noted on 70-B in your handwriting prior to
19 receiving the cancellation on February 17?

20 A I have no recollection of that.

21 Q It could be either way, is that it?

22 A It could be. I have no recollection of
23 that.

24 Q How did you first receive information of
25 the desire of Mr. Fisher to cancel; from whom?

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KEY, ON APRIL 17, 1972

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Key

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A Again, I don't know. I can't fix the time
3 chronologically in my own mind.

4

Q Don't worry about the time. Worry about
5 the method of communication. Did you get a telegram, phone
6 call, or what?

7

A I got nothing from Mr. Fisher myself.

8

Q Did somebody tell you about it?

9

A Somebody must have, yes. But who, I don't
10 know. It could have been Mallett, it could have been
11 Smythe, it could have been anybody.

12

MR. FOLEY: Could we take five minutes,

13

if I may?

14

THE SPECIAL MASTER: Yes. Off the record.

15

(Discussion off the record.)

16

THE SPECIAL MASTER: We will recess for

17

lunch now until 1:30.

18

(Luncheon recess taken.)

19

EXAMINATION BY MR. FOLEY continued:

20

Q Mr. Key, have you been aware that this
21 litigation has been underway since the summer of 1969?
22 I am not asking you are you aware now. Have you been
23 aware since its inception in the summer of '69?

24

25

A I was aware we had trouble with it, but I
didn't know there was actually a suit going on.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 19721
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Q Without telling me what was said, can you tell me were you involved at any point since July of 1969 in the gathering or preparation or organization of documents or other information about this case?

MR. MC ALLISTER: I object to the question.

It is irrelevant. It is after the action.

THE SPECIAL MASTER: I will hear argument.

MR. FOLEY: The argument is this. The record so far indicates that there apparently has been enormous difficulty, at the very best, in accumulating the data which we felt we were entitled to in this particular matter. There is a serious question in my mind whether all available avenues of exploring this on the part of the defendant have been utilized. I have a feeling that key witnesses should have been consulted so as to gather the documents that we required and the information that we required.

I get an awful lot of I forget, I don't know, I didn't hear about it until a week ago, et cetera, et cetera, this morning. I am pushing now to find out whether I am pursuing something fruitful with this witness, or whether he is largely a waste of time of all of us, and the extent to which

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1

Key

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2

this is so. I have other possible utilization

3

of this in mind, also, but it is for the purpose

4

of this lawsuit. This is the key one I point out

5

now.

6

THE SPECIAL MASTER: Did Mr. Key sign any

7

of the interrogatories or certify as to compliance

8

with the various discovery requirements?

9

MR. FOLEY: No. That was done by Mr. Dweck,

10

but on the basis of conversations with other

11

persons in the firm, not including Mr. Key, as

12

a named party. I just want to know the extent to

13

which he was involved at all. Frankly, I am

14

astounded at the testimony this morning that he

15

wasn't aware of certain things until preparation

16

of this deposition, which is the way I read that

17

testimony, or thought I heard it.

18

MR. MC ALLISTER: I think that is an assump-

19

tion on your part. I would not permit you to go

20

into the facts without a ruling by Mr. Galgay.

21

What you are seeking here is some ruling for a

22

motion in the future. I don't think it has any-

23

thing to do with the merits of the action. Second-

24

ly, I think you are seeking material which is

25

irrelevant because it is after the filing of the

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Key

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complaint.

THE SPECIAL MASTER: Let me hear the question.

(Question read: "Without telling me what was said, can you tell me were you involved at any point since July of 1969 in the gathering or preparation or organization of documents or other information about this case?")

MR. FOLEY: I add one more argument, if I may. Inasmuch as I have excluded the content of communications from the question, privilege and work product are not involved.

MR. MC ALLISTER: I still say what you are seeking has nothing to do with the merits of this action.

THE SPECIAL MASTER: Based on the testimony of Mr. Key's deposition thus far, I will allow his question and overrule your objection. Your exception is noted.

A No.

Q Did I understand you correctly this morning that you didn't participate in any such activities until the very recent past, when you were preparing for this deposition?

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1

Key

75

-2

A Yes.

3

Q Returning to Defendant's Exhibit A, I believe we closed before lunch by asking you when you first became aware of this telegram.

4

5

6

A Again, I can't honestly say when I became aware. What is the date on this one? February 17th. Is that when we received it?

7

8

9

Q I am going to identify this telegram for you. This is the one in which Mr. Fisher sought to cancel. I don't know whether that is your date stamp or not. You would be able to identify that better than me.

10

11

12

13

14

A I don't know whether this is your copy or our copy. I don't know.

15

16

Q This is yours.

17

A I don't know.

18

Q Do you ever recall seeing it before?

19

A No.

20

Q Do you recall being informed by somebody that a cancellation had taken place?

21

22

A Yes, I must have, because --

23

Q I prefer to know whether or not you recall it than whether you must have.

24

25

THE SPECIAL MASTER: Take your time and
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KEY, ON APRIL 17, 1972

Key

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1
2 search your memory, if that is what you need, to
3 give the appropriate answer.

4 A I would say yes. Again, I am fudging a bit.

5 Q The fact is, do you have a clear recollection
6 of the occasion when you first became aware of this?

7 A Not of the first occasion. I recollect
8 becoming aware of this problem at about this time.

9 Q Can you describe the circumstances and what
10 happened at that time when you became aware of it? Were
11 you in discussion with somebody, or how did you become
12 aware of it?

13 A As I recall, Fisher wanted to cancel his
14 trade and we told him he couldn't.

15 Q How did this information get to you? That
16 is what I am asking you.

17 A That I don't remember. I don't remember who
18 spoke to me about it, whether it was Mallett or whether
19 it would have been in the cage. I don't know where it
20 came from. I remember being made aware of it. Maybe it
21 was from the OTC, but I don't know. I don't remember
22 where it came from.

23 Q Do I understand, though, that you do recall
24 a decision being made not to permit a cancellation?

25 A Yes.

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KEY, ON APRIL 17, 1972

1

Key

77

2

Q Do you have a specific recollection of that

3

decision being made?

4

A Yes.

5

Q Can you tell me was that shortly after the

6

request was made, or when?

7

A That I don't know. I know we made a decision

8

not to cancel his trade.

9

Q Who do you mean "we"?

10

A Me. I am the one who is responsible for the

11

decision.

12

Q Who did you discuss it with?

13

A I discussed it with Compliance. Scott

14

Long.

15

Q Is Scott Long in the Compliance Department?

16

A Yes.

17

Q Is he in charge of it?

18

A Not any more.

19

Q Was he then?

20

A For what the compliance department was

21

worth, he was then. We had a fellow who had gotten sick.

22

He wasn't involved in it, I don't think.

23

Q What was his name?

24

A June Burns. I think he has been out longer.

25

Q Can you describe the circumstances, whom you

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KEY, ON APRIL 17, 1972

Key

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1
2 were with and whom you were talking with at the time
3 the decision was made not to permit cancellation?

4 A I think I was speaking to Scott Long.

5 Q Can you describe the conversation? What
6 did you say to him and what did he say to you?

7 A I don't have a clear recollection of it,
8 but I do remember that here was a guy who had bought
9 stock three or four months before and he wanted to cancel
10 his trade.

11 Q This was discussed?

12 A Yes, with Scott Long; and it was my deci-
13 sion, you know, I am not going to cancel a trade three
14 or four months old.

15 Q At that time did you know the transfer
16 status of the securities that were purchased to execute
17 Mr. Fisher's order?

18 A I can't honestly say. No, I do not have a
19 clear recollection of that.

20 Q Would you make a decision like that without
21 ascertaining whether there was a transfer of shares?

22 A It's a matter of when the trade was made.
23 Here is a guy where the trade was three months old and
24 he wants to cancel. I'd say no to that.

25 Q So that I can be sure I understand you now,

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Key

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2 you are testifying regardless of whether or not the shares
3 had been transferred, regardless of whether or not there
4 were transfer problems, regardless of whether or not the
5 shares were good, regardless of whether or not there were
6 registration problems, regardless of whether or not they
7 were even delivered, regardless of all such considerations,
8 the mere age of the order is enough; you will refuse
9 cancellation?

10 A Yes.

11 Q At the time that this decision was made,
12 did you make any inquiry as to whether or not a delivery
13 had ever been received of the shares ordered?

14 A I don't recall making such a request.

15 Q Do you know whether or not at that time you
16 knew the information which you put in handwriting on
17 Exhibit 70-B?

18 A No, I do not. You are referring to this
19 thing down here (indicating)?

20 Q I am referring to all of the material on
21 that exhibit.

22 A No, I can't say how much I knew about bad
23 stock or anything else prior to that time.

24 Q You are referring to prior to the time at
25 which you decided not to go along with the cancellation?

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1 Key 80

2 A Yes. Mind you, I am not denying it, but
3 I just don't know whether that was the case or not.4 Q What was the extent of your discussions at
5 that time when you made this decision with Scott Long?
6 What did he say? You indicated you merely made a state-
7 ment that in light of the length of time that the order
8 is outstanding, you wouldn't cancel. What did he say, or
9 what were the other considerations in that discussion?10 A I think it was his feeling, as it was mine,
11 that here was a case where a guy had bought stock three
12 months before and wanted to cancel the trade, and we
13 felt he shouldn't be allowed to.14 Q Scott Long's position in the compliance
15 department, did that involve his resolving any difficulties
16 or any questions that would arise respecting obligations
17 due to clients of the firm?

18 MR. MC ALLISTER: Read the question.

19 (Question read.)

20 THE SPECIAL MASTER: Do you understand the
21 question?

22 THE WITNESS: I guess so.

23 MR. MC ALLISTER: Do you understand it or
24 not?

25 THE WITNESS: I think I understand it.

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KEY, ON APRIL 17, 1972

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Key

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A I think the decision was mine as to whether we went ahead and cancelled or not. But I went to him for his opinion.

5

Q Why?

6

7

8

A Well, because he is in the compliance department. He is a lawyer. When I have questions of this sort I quite often go to him.

9

10

11

12

Q To get back to where we were, do you go to him because he as part of his job resolves questions that arise with respect to the relationship to and duties with respect to service to customers?

13

14

MR. MC ALLISTER: I will object to the form of the question, as to the word "resolves."

15

16

MR. FOLEY: I will replace the word "resolves" with "answers."

17

18

MR. MC ALLISTER: Please read the question now, with the change in it.

19

20

21

22

23

(Question read: "To get back to where we were, do you go to him because he as part of his job answers questions that arise with respect to the relationship to and duties with respect to service to customers?")

24

25

A I think Scott Long handled a lot of customers' complaints. Would that answer it?

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Key

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Q. Well, not really. What I want to know is do you go to him as a compliance officer of the company to get an answer when you have a difficulty respecting your relationship or in the legal aspects of your relationship with your customers?

A Yes.

MR. MC ALLISTER: I think the witness already testified he goes to him for opinions. I think the witness testified that five minutes ago.

THE SPECIAL MASTER: Let's get an answer to this question.

A I go to him for opinions, and answers,
if you want to use that word as well.

Q In the course of your discussion with Mr. Long, did anybody discuss the fact that a relationship existed between Harris, Upham and Mr. Fisher?

A Again, we get to this point of when did I know all about this.

Q No, we don't. I am talking about the client to principal relationship, agent to principal.

MR. MC ALLISTER: Who is the agent and who is the principal?

MR. FOLEY: That is what I want to know. I

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KEY, ON APRIL 17, 1972

Key

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2 want to know if they discussed it.

3 MR. MC ALLISTER: I object to this.

4 MR. FOLEY: I am asking him whether a
5 conversation took place. We are getting back to
6 where we were this morning.

7 THE SPECIAL MASTER: If he has an objec-
8 tion, maybe you can rephrase your question.

9 MR. FOLEY: For the last two or three
10 objections, I am beginning to see more discussion.
11 I would like to put a flag on it so we try to stay
12 away from it.

13 THE SPECIAL MASTER: Let's have the question
14 read back and you can phrase it a little more
15 precisely.

16 Off the record.

17 (Discussion off the record.)

18 MR. MC ALLISTER: I will object to the
19 form of the question.

20 THE SPECIAL MASTER: Rephrase it.

21 Q Are you familiar with the difference between
22 acting as a principal and agent in a transaction?

23 A I believe so.

24 Q In the case of the Fisher transaction were
25 you acting as a principal or an agent?

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Key

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A We bought it for him as an agent.

Q Who is agent?

A I guess we were Fisher's agent.

Q In the sense that you understand that principal-agent language in the securities industry, you were the agent for your customer, Mr. Fisher; is that correct?

A Yes.

Q In the course of your discussion with Scott Long, did this agent relationship in the sense that you have testified arise?

A No.

Q In the course of your discussion with Mr. Long, did you discuss at all what obligations you may have to Mr. Fisher?

A Again, I would have to assume we did.

Q Without assuming, can you recall any discussion on that subject?

A I hate to be vague on this thing, but then I have to be. You can have several conversations on a variety of subjects in the course of a week.

Q I am not talking about the course of a week.

A The course of a day.

Q I am talking about the conversation you had

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

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1
2 with him at the time you made this decision not to permit
3 cancellation as requested by the customer.

4 A As I recall, the main thing was that the
5 guy had bought it three or four months ago and we didn't
6 feel he had any reason to renege on this trade.

7 Q I am pursuing the point of whether or not
8 you had any discussion in the process of reaching this
9 decision not to permit cancellation, whether you had any
10 discussion of any obligation you may have had to your
11 customer.

12 A I cannot recall if I did.

13 Q Do you recall making any inquiry to get
14 factual information with respect to this transaction that
15 would be of assistance to you in considering what, if
16 any, obligations you had to your customer?

17 A No.

18 Q Showing you again Exhibit 75, does this
19 refresh your recollection as the day on which you received
20 information about the wire which is before you and which
21 has been marked Defendant's Exhibit A?

22 A It doesn't refresh my memory, but I can make
23 the assumption that one was dependent on the other.

24 Q Exhibit 75 is a Telex that you sent, is
25 that correct?

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Key

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2 A Yes.

3 Q Do you recall sending that Telex to
4 Mr. Mallett in Florida?

5 A Yes, I think I do.

6 Q Can you tell us whether or not the final
7 decision had been reached prior to sending that Telex
8 to refuse cancellation?

9 A Yes.

10 Q Consequently, then, is it your testimony
11 that the decision to cancel was reached the same day the
12 telegram was received from the customer?

13 A Again, it is easy for me to make a comparison
14 looking at these two things. But if you are asking me
15 if it refreshes my memory, I can't honestly say it does.

16 MR. FOLEY: Reread the question.

17 (Question read.)

18 A Again, I don't have a clear recollection
19 of that, but I would again assume that this wire here
20 was the result of having received this one.

21 THE SPECIAL MASTER: You are saying 75 is
22 your first reference to a telegram and Defendant's
23 Exhibit A is your second reference.

24 THE WITNESS: Exhibit 75 was a result of us,
25 I would assume, having learned about Defendant's

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KEY, ON APRIL 17, 1972

Key

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Exhibit A.

3

4

5

Q Do you recall whether or not when Defendant's Exhibit A was received and was physically placed in your hand it was the occasion of any prompt discussions?

6

7

A No. I don't recall ever having seen it before, to tell you the truth.

8

9

Q Whether or not you saw it, you knew about it. That is what I mean.

10

11

12

A We knew that guy wanted to cancel his trade.

Q Was that the subject of prompt discussion?

A I would say yes.

13

14

15

16

Q On the basis of reviewing the exhibits and the testimony you have given here recently, have you any refreshed recollection of with whom those discussions were held and what was said and by whom?

17

18

19

A Not so much what was said, but that I believe it was both Scott Long and our opinion that we didn't want to cancel the trade.

20

21

22

23

24

25

Q Was Mat Smith involved in those discussions?

A To the best of my knowledge, no.

Q Was Mr. Smythe?

A I don't know. I don't think so. I think it was only Scott Long and myself.

Q Was Mr. Dweck involved?

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KEY, ON APRIL 17, 1972

Key

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1
2 A No.

3 Q Was there ever an occasion that you were
4 aware of when the customer rather than requesting
5 cancellation of his trade requested delivery of securi-
6 ties?

7 A I can't remember, no. No, I don't recollect.

8 Q Your testimony, as I understand it, is you
9 were not involved in that. Is that true?

10 A That is correct.

11 Q In Exhibit 75, the last thing you do is
12 ask Mr. Mallett "Please advise." Did you receive a
13 response to that?

14 A I don't know.

15 Q What in particular did you want him to tell
16 you or inform you about?

17 A Well, if he had any information. I don't
18 recall we were asking for any specifics. It was a normal
19 ending to it.

20 Q I don't see any request for specific
21 information. Were you asking for information or seeking
22 to have him find out?

23 A I imagine we wanted to hear what the cus-
24 tomer had to say about it, if anything, if the customer
25 had anything to say about it.

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KEY, ON APRIL 17, 1972

Key

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2 Q Once again, with respect to Exhibits 70-B
3 and 76, I would like you to note these again and ask you
4 to observe the fact that February 14 was a Friday and
5 February 17 was a Monday.

6 A Yes.

7 Q Can you tell me what communication 76 was
8 in response to? Note the hour in the morning. It was
9 early.

10 A I don't know what it was in response to.
11 I mean I don't recall what it was in response to.

12 Q The only other exhibit that I am able to
13 find for the 14th is No. 71 here.

14 MR. MC ALLISTER: Excuse me. 76 is the
15 17th.

16 MR. FOLEY: It is the first thing in the
17 morning, the next working day. I am just trying
18 to see if we can somehow or other acquire the
19 information as to what was being responded to by
20 76. There has to be a reason why that was sent.

21 A This must have been the result of No. 70-B
22 here. This is 9:24 and 76 is 9:45.

23 Q Was it regular for him to send you telegrams
24 at an early hour like this?

25 A No.

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Key

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THE SPECIAL MASTER: Identify the document
you have in your right hand.

THE WITNESS: Exhibit 71.

Q Do you recall during November and December
of 1968, or January of '69, ever being informed that
Mr. Fisher was seeking delivery of his securities?

A No.

Q Did you ever hear anybody say that Mr. Fisher
was "hounding" Mr. Cowan, the registered rep?

A No.

Q Did Mr. Mallett during that period of time
ever call you and ask you for assistance or discuss the
matter with you?

A During what period?

Q During the period November, December,
January.

A No.

Q During February you have some telegrams
there --

MR. MC ALLISTER: A telegram.

MR. FOLEY: You have more than one telegram.

MR. MC ALLISTER: Telexes.

Q You have Telexes from Mr. Mallett about
Bartep. I would like to show you No. 77. Does this

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Key

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1
2 exhibit refresh your recollection as to what the discus-
3 sion was between you and Mr. Mallett about Bartep and
4 Mr. Fisher?

5 A I can't assume there was a conversation.

6 Q Was there any dialogue between you at this
7 point to which this refers?

8 A This would be the dialogue.

9 MR. MC ALLISTER: Referring to what?

10 THE WITNESS: Referring to the wires that
11 were going back and forth.

12 THE SPECIAL MASTER: What exhibit is that?

13 THE WITNESS: Exhibit 77.

14 Q No. 77 refers to instructions to Lobe.

15 A Yes.

16 Q Were you acquainted with those instructions?

17 A No.

18 Q Do you know who gave them?

19 A No; but Lobe works in the margin department
20 and he is the margin clerk for Miami. He may have received
21 something about shipping out stock from the cage.

22 Q You received this Exhibit 77, I take it,
23 from Mallett?

24 A It is addressed to me and I must have re-
25 ceived it.

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Key

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2

Q When you received it, what did you do?

3

A I don't remember what I did. I can surmise
and guess and stuff.

4

5

Q No.

6

A I am not trying to be difficult.

7

Q Prior to this time had you ever heard any-
one suggest sending stock to Mr. Fisher?

8

9

A Prior to the 18th or the 17th?

10

Q Prior to the receipt of this Telex No. 77.

11

A I can't say that I did, no. I mean for a
fact, no, I cannot.

12

13

Q Referring again to Exhibit 77 and comparing
it with 70-B, at the time that you made these handwritten
annotations on 70-B, had you made those and discovered
the information which they reflect when you received 77?

14

15

16

17

A That I don't know. I don't know when those
notations were made on 70-B. It might have been made at
two different times, because I notice I used two differ-
ent pens.

18

19

20

21

MR. FOLEY: Off the record.

22

(Discussion off the record.)

23

Q When you received Exhibit 77 from Mr. Mal-
lett, what did you do?

24

25

A To the best of my recollection, I don't

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Key

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know what I did.

3

Q Would it be encumbent upon you to contact anybody when you receive this information?

4

5

A Yes.

6

Q Who?

7

A I could have gotten ahold of Scott Long or possibly the cage, to find out the extent of the trouble.

8

9

10

Q Do you know whether you did?

11

A I don't. But it is not the sort of thing I let sit, lie around my desk.

12

13

Q Do you normally make any kind of notations

14

as to --

15

A The disposition of the thing?

16

Q Yes.

17

A On a regular basis, I don't, no.

18

MR. FOLEY: Off the record.

19

(Discussion off the record.)

20

Q Mr. Key, prior to coming in to this deposition did you see Exhibit 77?

21

22

A Yes.

23

Q Without telling me what you did or who you spoke to, did you make any particular effort to uncover any additional information about it beyond what you have

24

25

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

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1 given now or do anything to refresh your recollection?

2 A No. After that I spoke to Scott Long. I
3 don't recall I spoke about this one in particular to
4 him.
5

6 Q But did you discuss these Telexes in general
7 with Scott Long or somebody else at Harris, Upham?

8 A Yes.

9 Q In the process of reviewing these things
10 did you note the fact in your own mind that on seeing
11 them you didn't know what they were all about, very large-
12 ly?

13 A I can't say that. But there is a chronology
14 here that is very important. I don't mean to try to be
15 evasive with you at all, but in my own mind I just don't
16 know when these individual things took place. The fact
17 that today I know many of the problems that happened in
18 Bartep, we all know a lot of things happened in that
19 stock. But I can't place chronologically in my own mind
20 exactly when I learned things and when we did things,
21 except to assume from this. There is no doubt there
22 was a period in time -- and I am not sure of that period
23 of time -- when I was fully aware of all the problems
24 involved in this thing. Not fully involved, but I under-
25 stood what was going on. I know you have been trying to

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 19721
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Key

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get this information from me and I can't in my own mind provide you with that information. So if you ask me a specific time or a specific instance, I can't do anything but hedge my talk, because I honestly don't remember it.

MR. FOLEY: Off the record.

(Discussion off the record.)

Q Mr. Key, will you give us your version as you best recall it of what happened in this transaction of Mr. Fisher?

THE SPECIAL MASTER: From beginning to end, as far as he knows?

MR. FOLEY: As best he recalls.

A As far as I know, I had no recollection of this thing until Mallett became involved in it, and Mallett wired up. The ledger thing is very unclear. I mean the letter stock is very unclear in my mind, because I don't know when or where I found out about that first.

Q Is this your reference on Exhibit 70-B?

A Yes. When I learned about that, when I put that down there, I don't know, and I don't know who I spoke with. I do remember that somewhere around here that plane crashed and all the Bartep guys were killed. I do remember that there was letter stock around. I do remember that the guy was trying to cancel his trade or

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

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1
2 get his money back. I do remember that he never actually
3 tried to sell his stock. Other than that, I can't put
4 it into a package for you. Do you see what I mean?
5 And I would have to assume that it all happened right
6 around this time. But if you are trying to pin it down
7 and tell me I did this because I knew that, I really
8 can't tell you. I remember the Bartep thing, but the
9 method in which it happened and the times at which it
10 happened and what pieces of information I learned first
11 are very difficult for me to come up with.

12 Q Do you know whether or not you ever learned
13 whether or not the certificates which were obtained on
14 the trade to execute Mr. Fisher's order were among those
15 lettered or legended stock that you are referring to on
16 Exhibit 70-B?

17 A No. If I understand the question correctly,
18 you are saying did I know if any of Fisher's stock was
19 legend stock. Is that what you are asking me?

20 Q Yes.

21 A No. I might put in an aside here, and that
22 is that in those days, as you will remember, there were a
23 hell of a lot of fails around and I think the whole street
24 was having a lot of problems on fails to deliver and fails
25 to receive, and it was not unusual to find a fail condition,

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KEY, ON APRIL 17, 1972

Key

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1 particularly in '69, when we were having these problems,
2 and I daresay there were a lot of customers sqawking for
3 delivery of stock, and there were many fails, for a number
4 of reasons.

5
6 Q At that particular time the fail problem was
7 affecting practically all of the houses. Isn't that true?

8 A As far as I know, yes.

9 Q Were you involved in any decisions with
10 respect to whether or not to fail another brokerage firm
11 for failure to deliver?

12 A No.

13 Q Or how about the return to them money for
14 certificates that had transfer problems?

15 A No. I had nothing to do with that. That
16 is a back office problem.

17 Q Were you aware at all at that time of any
18 predisposition on the part of Harris, Upham to avoid
19 failing back to a selling broker or returning securities
20 to a selling broker?

21 A No. We wanted to clear that stuff up as
22 soon as we could. We wanted our stock delivered to us
23 and our stock delivered out as fast as we could.

24 Q But I am asking you whether by clearing it
25 up, do you mean clear it up in some way other than

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KEY, ON APRIL 17, 1972

1

Key

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2

returning it to the broker for money.

3

A No. We would have to return it to the

4

broker.

5

Q Was there any apprehension that you were

6

aware of at that time that if one house started failing

7

or returning for cash, it could start a snowball going,

8

in effect, that everybody might start doing it?

9

MR. MC ALLISTER: I will object to the

10

question as irrelevant.

11

THE SPECIAL MASTER: I will overrule your

12

objection.

13

A I'd say that the problem would exist if we

14

got news of a house that is in trouble.

15

Q No. I am just talking about the fact -- I

16

will start a new question. You have testified that there

17

was a major fail problem among many houses.

18

A That would be a fair assumption.

19

Q And there were situations which under normal

20

circumstances might well have called for failing for cash

21

or for returning for cash or for buying in. Is this

22

true?

23

A Yes.

24

Q And in many instances is it your testimony

25

that when anyone of those three alternatives might have

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 99

2 been done, the fact they weren't, an effort was made to

3 clear up the transaction over a longer period of time?

4 A Everybody was trying to clear them up.

5 Q Everybody was trying to clear them up?

6 A Certainly. All the firms were trying to

7 clear them up. Is that what you mean?

8 Q Yes.

9 A Yes.

10 Q Was there any apprehension that you were aware

11 of of anybody in the securities industry, particularly

12 on the part of people at Harris, Upham, where rather than

13 try to clear up the transaction, they promptly failed

14 them or returned them for cash or bought them in, the

15 result might be that in instances where Harris, Upham,

16 let us say, was in a fail position to another brokerage

17 house, the same could be done to them and this could

18 cause a snowball problem?

19 A I really don't think I am competent to

20 answer that. It is a cage problem.

21 Q I am asking you whether you were aware of

22 it. That you are competent to answer.

23 A I was aware that we had a fail situation,

24 but I was not aware of any snowballing problems in the

25 Street.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

100

Q Fear.

A Fear in the Street, no. I don't know what you mean by snowballing problem.

Q I will clarify just what I was referring to and then ask again the question. What I was asking was this. Were you aware of the fear in the Street that if somebody started to act promptly on fails --

A By buying in?

Q By buying in, failing, or returning for cash, with respect to fails to deliver and with respect to transfer problems, there would have been reciprocation all over the Street, one house doing it to another, and it would have created a chaotic situation?

A I was unaware of it, but I could see the problem that might arise.

Q You are personally unaware of it?

A Yes. We were always making our deliveries and taking them in whenever we could. We had a problem.

Q Did you ever hear any discussion of that at Harris, Upham?

A No. I don't think in '68 anybody knew about fails, anyway.

Q They did find out in '68, though, didn't they?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

101

1

2

A Yes.

3

Q Do you recall sending this Telex, Exhibit

4

79?

5

A Yes.

6

Q Do you recall what inquiries you made to

7

find out the transfer status?

8

A I think Scott Long and I again had talked

9

with Bill Smythe on the status of the Bartep.

10

Q Can you tell us whether or not that discussion

11

with Bill Smythe had anything to do with acquiring the

12

knowledge that was there that you noted on 70-B?

13

A I can't make a connection between this and

14

anything.

15

Q Do you know whether or not the information

16

contained on 70-B was ever known to Scott Long?

17

A I can't swear to that. In this here, this

18

stuff (indicating)?

19

Q Yes. I am talking about the handwritten

20

annotations on 70-B.

21

A No.

22

Q In relation now to Exhibit 79 again, will

23

you tell us the substance of your discussion with Smythe

24

which led to this, what he said to you and what you said

25

to him?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

102

1

2 A I am afraid I can't help you on it.

3 Q Do you recall the conversation?

4 A No.

5 Q You are just surmising, then, a conversation
6 took place on the basis of what is here on this exhibit?

7 A Yes.

8 Q Do you ever recall any difficulty you had in
9 contacting Mallett?

10 A No, I don't even recall that.

11 Q How did you normally communicate with
12 Mallett?

13 A I usually communicated with him by wire.

14 Q On a Telex, is that what you mean?

15 A Yes.

16 Q Did you phone him frequently?

17 A No.

18 Q On 79 there is a reference to the fact that
19 the circuits were busy. Would that lead you to believe
20 you tried to phone him that day?21 A That would be my assumption. I don't think
22 our wire would have been busy. I would say it would have
23 been the telephone circuits.24 Q Do you know why you wanted to talk with
25 him?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

103

2

A Again, I can't say I remember why. I assume

3

it was the Bartep.

4

Q Reviewing 77, 78 and 79, would you say that

5

79 is a response by you to the earlier two?

6

A Yes.

7

Q Why did you want him to contact the customer,

8

as you indicate on 79?

9

A 79?

10

Q The last thing you say on there is "Have

11

you been able to contact the customer".

12

A Again, I have to rely on what I assume from

13

this. But I would say we were telling the customer

14

that the stock is in transfer and he had to take delivery.

15

Q Do you know whether or not that information

16

was ever conveyed to the customer?

17

A No.

18

Q That is, pursuant to your request.

19

A No. I don't even recollect.

20

Q When you say on Exhibit 79 the stock was

21

in transfer, does that refer to being in the process of

22

transfer by the transfer agent, or merely in your trans-

23

fer account?

24

A I would imagine it meant by the transfer

25

agent. It is in transfer. We send it to the transfer agent.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

104

1 That is my understanding of the definition of the word.

2 Q However, you do not have a recollection of
3 whether or not it was in fact in transfer? Is that my
4 understanding of your testimony?
5

6 A You are right. I had no clear recollection
7 that it was in transfer, except when I look at this here
8 and you ask me whether the stock is in transfer.

9 Q Prior to this time had Mr. Smythe given
10 you any information with respect to the contents of
11 Exhibits 39, 43 and 48?

12 A To the best of my knowledge, no. I had
13 received this this morning. I had never seen this before.
14 The information contained there wouldn't be --

15 Q Did Smythe tell you anything about the fact
16 that there had been rejections by the transfer agent?

17 A He could have, but I honestly don't recall.

18 Q On the basis of what you put into this
19 telegram here, Exhibit 79 --

20 A Oh, on the basis of what is in the telegram,
21 yes. But on the basis of my recollection, I don't recall
22 quite as well.

23 Q What I am wondering about is this. Assuming
24 for the moment the documentary evidence in this case
25 already indicates that in fact a rejection had taken place

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 105
2 before this date, before February 18th, and that Smythe
3 knew it, or his department knew it, I am asking whether
4 in the process of checking with that department to find
5 out the information that you have included in Exhibit 79
6 here you became aware of the fact that the transfer agent
7 had rejected the stock.

8 A I would say that I became aware that there
9 was a fail. That must have occurred in here.

10 Q I am not talking about fails. I am talking
11 about a rejection by the transfer agent.

12 A No, I don't remember the information regard-
13 ing that.

14 Q When you would make the inquiry that you
15 testified that you made to get the information that you
16 put in Exhibit 79, would you address that inquiry to
17 Mr. Smythe himself?

18 A Would you say that again?

19 MR. FOLEY: Read it, please.

20 (Question read.)

21 A Yes, I would think we would ask Bill Smythe
22 what is the status of the Bartep, can you ship it out.

23 Q When you use the word "we," whom do you
24 mean?

25 A Scott Long and myself.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

106

Key

Q Personally, though. You wouldn't convey this information to other people?

A We would have probably telephoned Bill Smythe, or maybe he came down. I just don't remember.

Q Would the request which you would make for this information make it incumbent upon Mr. Smythe to inform you if in fact the transfer agent had rejected the particular securities?

A Possibly, yes. If he has any indication of any fail, of any skulduggery, he is supposed to tell us of it.

Q Apart from skulduggery, you have three letters in front of you which have been marked as Exhibits 39, 43 and 48 which show a rejection by the transfer agent of the securities which were originally obtained to execute Mr. Fisher's order. What I want to know is this. When you made inquiries of Mr. Smythe as to the status of the shares in question --

A You are assuming that. I believe I did, but I don't remember the actual instance.

Q I am assuming what?

A You are assuming I did call Mr. Smythe. I can't actually remember the conversation myself. You asked me what I thought I would do in the normal course

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

107

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of my business and I am trying to tell you.

3

Q Would he ask you for certain information

4

which would make it incumbent upon him to tell you we

5

have been rejected by the transfer agent on these securi-

6

ties?

7

A Yes, I think that would be fair, if "incum-

8

bent" would be the proper word. Would be his responsi-

9

bility.

10

Q And he knew that?

11

A He should tell us about it, sure.

12

Q And you know Mr. Smythe?

13

A Surely.

14

Q He has been around long enough. He knows

15

he should tell you that, isn't that true?

16

A Yes. I would think if there is any problem

17

like that, he would let us know, certainly.

18

Q And your testimony is that you have no

19

recollection of ever being told that. Is that true?

20

A Ever being told that there was any --

21

Q At about this time, February 18th.

22

A I can't put my finger on the time. You put

23

sixty-one on that Telex, or wire, as we call them, and

24

then you ask me did I know now. I know I knew about it

25

at some juncture, but I can't pinpoint it for you.

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KEY, ON APRIL 17, 1972

Key

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Q Did you know about it, say, two or three weeks ago, that there was a rejection by the transfer agent?

A Yes, I would say so.

Q Did you learn of it prior to the institution of this lawsuit? I am thinking through the spring and early summer of 1969. Did you know about it then?

A I am not even sure the lawsuit was in progress.

Q The rejection was February 17 of 1969. Not the rejection. The telegram to cancel.

A I couldn't tell you.

Q I am asking you to try and place it in terms of time within six months after.

A I don't think I could do that. I mean I can't put a date on it.

Q Do you recall the circumstances under which you acquired the knowledge that the securities had been rejected by the transfer agent?

A No. It could have been Smythe; it could have been Mallett. It could have been -- I don't know.

Q Did that information, when you did acquire it, have any influence whatsoever in your decision not to go along with the cancellation request by the customer?

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STANDARD AND CREDITORS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

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Key

109

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A I can't say.

3

Q Mr. Key, let me ask you this. On the basis

4

of an assumption, assume that Mr. Smythe had told you

5

of this rejection by the transfer agent, and assume that

6

you knew that the stock was restricted or non-transferrable

7

at the time you had to make the decision about the request

8

for cancellation. Would you have decided any differently

9

than you did if you had that knowledge then?

10

MR. MC ALLISTER: Can you repeat the question?

11

MR. FOLEY: I think he understood it.

12

MR. MC ALLISTER: I didn't. I want to

13

listen to the question.

14

(Question read.)

15

MR. MC ALLISTER: Do you understand the

16

question?

17

THE WITNESS: In other words, if I had known --

18

MR. MC ALLISTER: Do you understand the

19

question?

20

THE WITNESS: I think so.

21

THE SPECIAL MASTER: Off the record.

22

(Discussion off the record.)

23

MR. MC ALLISTER: Yes or no.

24

A No. I would have behaved in the same way.

25

Q You would have decided the matter the

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 19721
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Key

110

same way you did now and these other considerations
wouldn't have made any change?

A Yes.

Q Would that decision be any different if you
learned that a question was raised as to whether or not
the stock certificates themselves were forgeries?

A You just asked me that. Oh, you didn't
ask me if they were forgeries. You asked me if they were
restricted.

Q I am going further.

A I don't know. That would be a problem.
If we knew they were forgeries?

Q No. If you had reason to question whether
they were forgeries, what would you have done about the
cancellation request?

A I wouldn't have cancelled it.

Q What would you have done about it?

A I think I would have gone into the situation
a lot more deeply to determine whether they were in
fact forgeries.

Q Did you ever learn at any point that the
question was raised by Mr. Abney, who was the attorney
for Bartep, with a representative of Harris, Upham that
there were many shares of Bartep which had been sent in

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 111

2 for transfer which were never registered on the books
3 of the company, and that he had reason to believe that
4 the particular shares we are talking about here that had
5 been purchased for the order of Mr. Fisher, to execute
6 the order of Mr. Fisher, were among those securities?

7 MR. MC ALLISTER: I will object to the
8 form of the question.

9 Read the question back.

10 (Question read.)

11 MR. MC ALLISTER: I object on the ground
12 that the question seeks his knowledge at any
13 time.

14 THE SPECIAL MASTER: I might quarrel with
15 the question, Mr. Foley. It wanders a bit. If you
16 tighten it up, the question will be allowed.

17 MR. FOLEY: I will rephrase the question.

18 Q Were you ever aware of any communications
19 with Mr. Abney, as suggested by Exhibits 39, 43 and 48?

20 A No.

21 Q Did you ever hear from anybody what happened
22 when an inquiry was made to Mr. Abney?

23 A No.

24 Q Would it be the duty of Mr. Smythe to make
25 those inquiries, or his department?

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

112

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2 A I don't know. I don't know how Mr. Abney
3 was involved in this.

4 Q You might take a look at the exhibits.

5 THE SPECIAL MASTER: Off the record.

6 (Discussion off the record.)

7 A No. I am unfamiliar with these.

8 Q After you became involved in the matter of
9 Mr. Fisher and his Bartep shares, would you consider it
10 the duty of Mr. Smythe, if he learned from Mr. Abney that
11 there was a question as to whether or not the shares were
12 ever registered on the books of the company, to convey
13 that information to you?

14 A Yes. I would think he would either come
15 to me or the compliance department, which would be
16 Mr. Scott Long.

17 Q Would that be because either you or the
18 compliance department would have particular use for that
19 kind of information?

20 A I suppose we could use it, as to whether we
21 made delivery of stock or not. But I think anything
22 germane to the case or to the problem he should let us
23 know about, whether it is this instance specifically or
24 anything else.

25 Q Did you ever receive any information of

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

113

1
2 that nature through him?

3 A This (indicating)?

4 Q Not that. I am talking about any informa-
5 tion from Mr. Smythe about what Mr. Abney told him or
6 what he learned from Mr. Abney.

7 A No.

8 THE SPECIAL MASTER: We will take a five-minute
9 recess.

10 (Recess taken.)

11 Q I would like to show you Exhibits 94-A and
12 94-B and ask you whether you recall receiving that.

13 A Yes.

14 Q Does that refresh your recollection at all
15 as to whether or not at this time you knew of problems
16 in the Bartep stock that are referred to on Exhibit 70-B
17 in your handwriting?

18 A No.

19 Q Were you aware of the contents of this
20 article, particularly the references herein to some of
21 the personalities involved, at the time you made the
22 decision not to go along with the cancellation of
23 Mr. Fisher's sale?

24 A You mean did I know of this before that?

25 Q Yes.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

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A Did I know about the contents of 94-B before this date here (indicating)?

Q No; before your decision was made.

A Before my decision was made to turn down
the request for cancellation?

Q Yes.

A No.

Q Were you aware at any time prior to receiving this newspaper article, 94-B, that the SEC had taken action with respect to Bartep shares?

A No.

Q At the time you decided not to go along with cancellation, do you know whether you knew anything about actual or pending SEC action at that time?

A No.

Q Do you know whether or not you had any such information at the time you made the writings on Exhibit 70-B?

A No.

Q Would you have included them on there, or any reference to the suspension of trading on there, if you knew about it at the time?

A I don't know that I did know about it at the time, and if I had, I am not sure at all that I would

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

115

1
2 have written it on here. I might have written it on
3 another piece of paper.

4 Q At the time that you decided against can-
5 cellation, can you state whether or not at that time you
6 knew if you had the ability to cancel, the power to
7 cancel the sale?

8 A It is a little difficult to answer, because
9 you have the ability to accommodate your customer. You
10 should accommodate your customer in instances where you
11 can, but in this instance, let's say, where a trade is
12 made, there is a contract involved, it seems to me, and
13 it should stand. Maybe I am using the wrong word, but
14 there is an obligation on the part of the customer to
15 honor his obligation to the person he purchased the stock
16 from.

17 Q In other words, there is a Quid Pro Quo,
18 an agreement between these parties. That is what you are
19 trying to say, right? They have an agreement to do
20 certain things, and one of them is the agreement to buy
21 certain stock.

22 A Yes.

23 Q Is it your understanding of that agreement
24 that the other side has agreed to sell him good stock and
25 to produce it within a given period of time?

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STENOGRAPHIC AND SHORTHAND DEVICES

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

116

1
2 A Yes.

3 Q Would that also involve the obligation on
4 the other side to deliver good stock within a given period
5 of time?

6 A To deliver good stock? I would think yes.

7 Q Good transferable shares.

8 A Yes.

9 Q At the time that you decided not to proceed
10 with cancellation, did you make any inquiry as to whether
11 or not these terms had been lived up to by both sides?

12 A No.

13 Q Were you in possession of any knowledge or
14 any information, other than merely the execution date of
15 the original trade, which led you to conclude that rather
16 than accommodate your client, to use your words, you would
17 reject the attempt at cancellation?

18 A No.

19 MR. FOLEY: Off the record.

20 (Discussion off the record.)

21 Q After you sent Exhibit 79 to Mr. Mallett,
22 did you continue to hear from him with respect to
23 Mr. Fisher and his Bartep shares? I would like to show
24 you Exhibit 89.

25 A Did I talk to who? Smythe?

SCHON-GREVER

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 117

2 THE SPECIAL MASTER: You better have the
3 question read back, Mr. Key.

4 (Question read.)

5 A Well, Exhibit 89 would indicate I did
6 hear from him afterwards. But in point of remembrance,
7 it is difficult to say yes. I do remember speaking to
8 Mallett on the telephone.9 Q Do you ever recall any change in the status
10 of things? In other words, Mr. Fisher still demanding
11 his cash and Harris, Upham still insisting on going
12 through with the transaction?

13 A No.

14 Q After you and Long had your initial discussions
15 in the course of which the decision was made not to per-
16 mit cancellation, did you and Scott Long thereafter both
17 stay in touch with this situation?

18 A I think I did. I can't speak for Scott.

19 Q Did you stay in touch with him about it?

20 A I would assume I did, yes.

21 Q Do you know?

22 A I don't know for sure. I don't know how
23 long it dragged on. It went on quite awhile.24 Q Did you become aware at some later date
25 that there was difficulty in transferring the shares

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

118

1
2 that were in question?

3 A I could have been, but I don't know.

4 Q I show you Exhibit 90-A. Do you recall
5 receiving a copy of this communication?

6 A Would you repeat the question, please?

7 Q Do you recall receiving a copy of this
8 communication?

9 A No.

10 Q Were you privy to any steps that were
11 taken with the transfer agent or anybody else involved
12 in obtaining transfer of shares for Mr. Fisher?

13 A No.

14 Q Were you aware of any problems in relation
15 to the account of Mr. Bernard Miller?

16 A No.

17 Q Is the name of Gus Rubino at all familiar
18 to you?

19 A No.

20 Q Were you aware at any time that the shares
21 originally obtained in execution of the order placed by
22 Mr. Fisher, those shares which were received into Harris,
23 Upham, ultimately went to another customer, after trans-
24 fer?

25 A I did not know this.

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

119

2

Q

Is it your testimony that you have no recollection of ever receiving a copy of Exhibit 90-A?

3

4

A

Yes, it is. Again, I am relying on memory here. I am not making a categorical statement I never saw it. But to the best of my knowledge, I do not recall it, no.

5

6

7

8

Q

In the process of preparing for this deposition, did you look through your files and records to see if you had any information you could use?

9

10

11

A

I went through all my files prior to this. I went through an over-the-counter file that I have and I have nothing in there.

12

13

14

Q

This is a file you maintain for yourself?

15

A

Yes.

16

Q

Do you maintain any other records, such as diary entries, or anything of that sort, to show what your activities are?

17

18

19

A

No, I do not. Telephone conversations, that sort of thing?

20

21

Q

Yes.

22

A

No.

23

Q

Do you keep copies of the Telexes you send out?

24

25

A

I did then, but I don't now. This would

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STENOGRAPHIC AND SHORTHAND SERVICES

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

120

1 have been in my file (indicating).

2 Q That's referring to 70-A and B?

3 A Yes. I assume it came from my file. The
4 written ones I would assume came from my file.

5 Q And you have examined that and you do not
6 find any reference, for instance, to 90-A?

7 A No.

8 Q Or you do not find any reference or you had
9 no prior knowledge with respect to these Exhibits 39, 43
10 and 48?

11 A No.

12 Q You never saw those before, either?

13 A I have never seen these before, no.

14 Q Or copies of them?

15 A Or copies of them.

16 Q And you never saw any documentation that
17 would indicate to you that there had been rejection by
18 the transfer agent of the securities that had been pur-
19 chased to execute Mr. Fisher's order?

20 A No, not that I recall.

21 Q Subsequent to, say, March 1st, or subsequent
22 to February 17th and after the original decision was
23 made by you in discussion with Mr. Long not to permit.
24 cancellation of Mr. Fisher's order, did you and Mr. Long
25

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STENOYER AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

121

1
2 have subsequent conversations with respect to the problem
3 of Mr. Fisher and his Bartep shares?

4 MR. MC ALLISTER: Off the record.

5 (Discussion off the record.)

6 A Again referring to this, I would assume
7 we must have met a couple of times. But as far as my
8 recalling those individual instances, it is one blur.
9 It could have been one meeting, if you know what I mean.
10 I think we met more than once.

11 Q Can you give us the substance of what was
12 discussed at these meetings?

13 A I think whether we should deliver the stock.
14 Excuse me. That's wrong. Whether we should cancel the
15 trade or not.

16 Q Did you have any additional information at
17 any time to use as the basis of your discussion with
18 Mr. Long?

19 A No.

20 Q In other words, you never learned anything
21 that would add --

22 A The customer was screaming, I know that.

23 Q Who told you?

24 A Mallett.

25 Q Mallett, then, was at this point telling

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

122

you that the customer was pressing for his shares. Is that right?

A Yes.

Q Did you ever have any discussion with anybody subsequent to the original decision about not cancelling on the possibility of failing for cash, re-turning for cash, or buying in these securities?

A No.

Q Who is responsible for buy-ins?

A I don't know who is responsible for buy-ins at that time.

Q You never heard any discussion at all about it in the context of these shares?

A No.

Q I would like to show you Exhibit 96 and ask you do you recall receiving it and what did you do about it.

A I recall having received it.

Q Does this refresh your recollection as to whether or not you ever knew about an attempt that was made to ship securities in Street name or in Mr. Fisher's name to the Commercial Bank in Miami, Florida?

A No.

Q Or any other bank?

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STENOGRAPH AND SHORTHAND SERVICES

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

123

2

A No.

3

Q Can you testify what you did as a result
4 of receiving this Telex?

5

A Only that Mallett wanted to have the stock
6 shipped and we were having difficulty with transfer.

7

Q You knew then you were having difficulty
8 with transfer?

9

A 3/21. Well, I can't say that as a result
10 of this that -- I would say as a result of this I would
11 have known of the difficulty.

12

Q Can you describe the difficulty you had in
13 transferring it out?

14

A No, I can't. We had lots of difficulties.

15

Q Did you know at this particular time that
16 there was a suspension of trading by the SEC?

17

A I only assume that I did, because I gather
18 that the date was prior to this. But no, I am not even
19 sure of that in my own mind.

20

Q This Exhibit 96 was addressed to you, was
21 it not?

22

A Yes, it was.

23

Q I show you Exhibit 97. Exhibit 97 on its
24 face appears to be a response to Exhibit 96. However,
25 it was sent by Scott Long. This would indicate to me

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STENOGRAPHIC AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

124

1 that you and Scott Long had a discussion about Exhibit 96.

2 A Yes.

3 Q Do you recall that discussion?

4 A No.

5 Q Do you know whether or not any additional
6 information was obtained then as to the transfer status
7 of Bartep?

8 A No.

9 Q Do you know what the basis was for Mr. Long's
10 statement that we do not have five thousand to ship in
11 Street name to the bank? Did he check to find out, or
12 what?

13 A I don't know.

14 Q Were you aware of this response to Scott
15 Long, from Mallett responding to Exhibit 97?

16 A No. I have seen it, but I don't remember
17 this specifically.

18 Q Can you give us an indication of how long
19 ago you saw it?

20 A A couple of days ago.

21 Q In other words, it was prior to very recent-
22 ly. You were unaware of it?

23 A I could have seen it, but I don't remember
24 it.
25

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

125

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2

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4

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25

Q There is something about this that I would like to ask you. You will recall testifying here a couple of times today that to the best of your knowledge at no time after February 17 did Mr. Fisher indicate that he wanted anything else other than cancellation of his order.

A What was that question again?

Q Do you recall testifying that Mr. Fisher's position as of the 17th of February was that he wanted to cancel and get his money back?

A No. He wanted to have the stock shipped to him or cancelled.

Q Is that what he said in his telegram here? I show you Exhibit A again.

A That he didn't want the stock?

Q I show you the telegram.

A All right.

THE SPECIAL MASTER? Do you want to clarify the record?

Q On the basis of examining Exhibit A, can you improve your recollection at all as to what Mr. Fisher wanted?

A Yes. This is what he wanted.

Q He wanted his money back, is that correct,

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STENOGRAPHIC AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

126

and he wanted to cancel the order?

A He didn't say that here. Yes. He cancelled the five thousand-share order and "return total money paid for same." Correct?

Q On Exhibit 98 over here, Mr. Mallett for some particular reason seems to be discussing shipping five thousand shares. Did you ever become aware that Mr. Fisher changed his position?

A No.

Q You never heard of it before?

A I don't quite see what you are driving at.

Q I am just wondering whether you know anything that would be helpful in explaining this.

A No.

Q Were you aware of any subsequent efforts that involved Scott Long and/or Mr. Smythe to obtain transfer shares to Mr. Fisher's name or to Street name for delivery to Mr. Fisher?

A No.

Q You just were unacquainted with any efforts in that direction?

A I don't recall.

Q Were you acquainted with any subsequent efforts that were made by Mr. Smythe's department to have

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STENOGRAPHER AND COURT REPORTER

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

127

2

your Florida office contact the attorney for Bartep or
the selling brokers in this instance to try and obtain
any clarification of any transfer problems?

3

4

A I knew nothing about it.

5

Q I would like to show you Exhibit 102. This
once again is a Telex from Mr. Mallett to Mr. Long
reflecting something of a change of instructions. Do
you know anything about it?

6

7

A No.

8

Q Did you ever see it before?

9

A I don't think I ever saw this before.

10

Q Did Mat Smith get involved in any of the
discussions you had with Mr. Fisher about Bartep?

11

12

A To the best of my knowledge, he didn't.

13

To the best of my knowledge, I don't know that he was
involved in it.

14

15

Q Do you ever recall a statement being made
by Mat Smith that it would be best for Harris, Upham
to get rid of the Bartep securities, to get out of the
situation?

16

17

A No, I don't.

18

Q Do you ever recall anybody making a state-
ment to that effect?

19

20

A No.

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STENOGRAPHER AND SHORTHAND WRITERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

Key

128

Q Were you aware of any attempt that was made by Harris, Upham to have the shares or part of the shares which were originally acquired in execution of Mr. Fisher's order returned to selling brokers through the bank that dealt for the selling brokers in New York, American Bank & Trust Company?

MR. MC ALLISTER: I object to the form of the question. I think it is a mischaracterization of the evidence.

THE SPECIAL MASTER: Why don't you have it read back, Mr. Foley, and see if you want to clarify it.

(Question read.)

MR. MC ALLISTER: There was only one selling broker.

MR. FOLEY: Broker or brokers.

A No.

Q Mr. Key, I would like to show you Exhibits 108-A, 108-B and 108-C. In particular, I would like to direct your attention to 108-B. Can you tell us what the form is?

A This is a cage instruction of some sort. It is not familiar to me.

Q You are not familiar with the form, or what

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STENOGRAPH AND SHORTHAND REWRITERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1

Key

129

2 it is used for?

3

A No.

4

5

6

7

Q I would like to show you Exhibit 105 and direct your attention to the last sentence, and this purports to be a message sent from Smythe to Mallett. M.E.S., that's Mat Smith, isn't it?

8

A I would assume so. That's his designation.

9

10

Q In Harris, Upham, M.E.S. are the initials that identify Mat Smith?

11

12

A Sure, just like A.L.K. might identify me,

or Al Key, actually, they call me most of the time.

13

Q You don't know of any other M.E.S.?

14

A No.

15

16

Q Were you aware of the fact that Mr. Smith

stated what he is credited with what he is stating here?

17

A I do not.

18

19

Q Were you ever aware of any discussion to

fail stock for money, Bartep shares for money, back to Shenin?

20

21

A No. As I explained earlier, I am sure I

22

must have been aware we had difficulty transferring the

23

stock. But on top of that, I was not aware, or at least

24

I don't recall I was aware, of the reasons for it.

25

Q As far as you are concerned, on April 19th

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STENOGRAPH AND SHORTHAND REPORTERS

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 130

2 the position still was, as you had decided, that a can-
3 cellation of the order there would not be?

4 A A decision had been made well prior to
5 that.

6 Q Well prior to that, and it had not been
7 changed?

8 A No.

9 Q Did you know anything about efforts that were
10 being made to obtain releases on certificates, which
11 is referred to in Exhibit 105?

12 A No.

13 Q Did you ever become aware that the transfer
14 problem, whatever it was on these shares, was ever
15 resolved at any time?

16 A No.

17 Q On several of the exhibits that you have
18 seen here there is reference made to shipping securities
19 in Street name or in the customer's name during March.
20 At any time thereafter did you become aware --

21 A At any time when?

22 Q Say after the 1st of March; did you become
23 aware of any steps taken by Harris, Upham to replace the
24 shares which they sought to have transferred for delivery
25 to Mr. Fisher by other shares, to replace those shares

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON APRIL 17, 1972

1 Key 131
2 with other shares?
3 A No, I was unaware of anything of that sort.
4 Q As far as your recollection is concerned,
5 were shares ever shipped to Mr. Fisher?
6 A That is a fair question. Yes.
7 Q Ultimately?
8 A Were they finally shipped to him, I don't
9 know.

10 MR. FOLEY: Off the record.

11 (Discussion off the record.)

12 MR. FOLEY: Subject to the fact that this
13 witness and several others who have appeared
14 have been unable to furnish information that
15 we had hoped to obtain from them, I would terminate
16 this examination now subject to my intention
17 to examine the transcripts, which are lengthy,
18 and decide where the holes are and how we will
19 go about completing the information we need.

20 THE SPECIAL MASTER: Do you have any
21 questions of this witness, Mr. McAllister?

22 MR. MC ALLISTER: No, I don't, Mr. Galgay,
23 and I consider the deposition of Mr. Key closed
24 for that reason.

25 THE SPECIAL MASTER: I understand what

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

136

* * *

2

3

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4

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BY: DERMOT G. FOLEY, ESQ.
ALAN HARRIS, ESQ.,

9

Of Counsel

10

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Attorneys for defendant

11

12

One Wall Street
New York, New York 10005

13

BY: MICHAEL J. McALLISTER, ESQ.,
Of Counsel

14

ALSO PRESENT:

15

SCOTT LONG

16

17

ooo

18

19

THE SPECIAL MASTER: Are there any more
documents being produced this morning?

20

21

MR. McALLISTER: The documents have been
produced--

22

23

THE SPECIAL MASTER: At the last hearing or
since the last hearing?

24

25

MR. McALLISTER: Since the last hearing or

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1 Key 137

2 maybe even prior thereto. I have forgotten.

3 In any event, Mr. Foley has seen the originals
4 in each instance and he has had copies. The last
5 three documents that were produced were wires and
6 they were produced at the last hearing before you.

7 THE SPECIAL MASTER: No documents have
8 been produced subsequent to that time?

9 MR. McALLISTER: No, sir.

10 MR. FOLEY: They were produced up here
11 the last time, right?

12 MR. McALLISTER: That's what I just said.

13 I understand the reason for Mr. Key's
14 return is that there was a number of wires from the
15 unexecuted and traffic files from the OTC department
16 which had not been produced prior to Mr. Key's
17 deposition.

18 THE SPECIAL MASTER: All right.

19 MR. FOLEY: Excuse me for a moment. I am
20 trying to locate those other documents, my
21 copies of them.

22 MR. McALLISTER: Off the record.

23 (Discussion off the record.)

24 THE SPECIAL MASTER: Are you ready to
25 proceed?

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

138

2

MR. FOLEY: Yes.

3

4

5

THE SPECIAL MASTER: Mr. Key, when you
were first here for a deposition you were put under
oath, do you recall?

6

THE WITNESS: Yes.

7

8

9

10

THE SPECIAL MASTER: This is a continuance
of that deposition. You are still under that oath
and it is still binding on you. Do you still
understand that?

11

THE WITNESS: Yes.

12

13

14

15

16

17

18

19

20

MR. FOLEY: We are here this morning to
resume the deposition of Mr. Key because of the fact
that after the conclusion of the last day with
Mr. Key, Mr. McAllister informed me that a further
search had been made and additional documents located
which have--with respect to which Mr. Key could possi-
bly give testimony. Therefore, Mr. Key has been
asked to return for the purpose of examining these
aspects.

21

22

23

24

25

A L B E R T L E N O I R K E Y, previously
sworn, resumed the stand and testified further
as follows:

EXAMINATION BY MR. FOLEY:

* * *

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

* * *

1

Key

152

2

Off the record.

3

(Discussion off the record.)

4

Q Mr. Key, would you identify the first document?

5

A The document says it comes from Fort Lauderdale

6

and it's an order to buy a hundred Bartep Industries

7

at five and three-quarters.

8

MR. FOLEY: May we have it marked, please.

9

(Telex dated 10/25/68 marked
Plaintiff's Exhibit 131
for identification as of
this date.)

10

11

12

BY MR. FOLEY:

13

A I have another one.

14

A This is a wire to Mallett, Florida, dated

15

October 30, signed by me.

16

MR. FOLEY: May we have it marked, please.

17

(Wire dated October 30,
1968, marked Plaintiff's
Exhibit 132 for identifica-
tion as of this date.)

18

19

20

BY MR. FOLEY:

21

Q Was it your practice to keep an eye on changes

22

of activity in particular stocks?

23

A Yes.

24

Q Was there any particular reason for this?

25

In other words, what were you looking for or why

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

153

2

did you do it?

3

MR. McALLISTER: I will object to the form

4

of the question.

5

MR. FOLEY: Off the record.

6

(Discussion off the record.)

7

THE SPECIAL MASTER: I will allow the

8

question.

9

Mr. Key, I overruled your counsel's

10

objection, so would you kindly answer the question.

11

THE WITNESS: Would you repeat the question

12

for me, please.

13

MR. FOLEY: Please read it from the

14

record.

15

(Question read.)

16

THE SPECIAL MASTER: That question was

17

in connection with Plaintiff's Exhibit 132?

18

MR. FOLEY: Yes.

19

A We were looking for cases of unusual activity

20

or--unusual activity, any concentrations, any concentra-

21

tions of buying any large blocks. We like to know--we

22

like to have some explanation as to how they took place and

23

why.

24

Q Is it true that any particular change in the

25

activity--the trading activity of a particular stock

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

154

2

sometimes can be an indication that there might be a

3

problem that would need attention, maybe even a problem

4

with relation to manipulations or compliance problems

5

or something, and a change in activity in the stock is

6

sort of an indication to you that this is something to

7

watch out for?

8

A Yes, it would be.

9

Q Would the fact that you notice anything such

10

as that lead you to sending out a telex, such as this

11

Exhibit 132?

12

A It could, yes.

13

Q Would you say now that that in fact is what

14

the nature of your curiosity was that caused

15

this very telex to go out?

16

A A change in activity?

17

Q The change in the activity caused you to

18

wonder whether or not it was a problem that should be

19

explored, the possibility of a problem anyhow?

20

A Not necessarily.

21

Q In sending out this telex, was that among your

22

concerns, the possibility of a problem? Not that you

23

knew of a problem, but the possibility of one.

24

MR. McALLISTER: Asked and answered.

25

A You are changing the form of the question.

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

15b

2

Q I am.

3

4

A Well, do you want to know why I sent out the telegram?

5

Q Yes.

6

MR. McALLISTER: Asked and answered.

7

8

9

A I sent out the telegram because I noticed that there was--as I recall, there was a sizable block involved.

10

11

12

13

14

15

Q That's true. You did give that answer before, but now I am wondering about what that indicated to you in this instance that led you to conclude that you needed information. What you wanted to know or what you wanted to avoid--you had a reason. You just didn't do it automatically.

16

17

18

19

20

21

22

23

A This was a normal procedure that we followed--at least that I followed in the over-the-counter department. We received over-the-counter runs which I would go over and if I saw anything that looked odd or I saw any concentrations of buying or anything that looked like a stock was being tipped or touted, I would wire the offices involved as a matter of routine to determine whether there was any--there was anything unusual about it.

24

25

Q Essentially, would it be correct to characterize it a little further to say you wanted to find out if

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

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2

there was anything in particular wrong or potentially

3

wrong--

4

A Yes.

5

Q --in the trading pattern of this stock, not necessarily what your firm was doing, but just where you stood?

6

7

A Not the pattern, but whether there was anything wrong with the purchase or the size of the block.

8

9

Q Consequently, for purposes of avoiding potential problems, as I understand it, then--

10

11

A Yes.

12

Q --you felt it was advisable for you to get

13

information such as that which you requested in this telex?

14

15

A Yes.

16

Q Did you get an answer to this telex?

17

A I don't recall.

18

Q Did you keep a record of this telex at the time that you sent it?

19

20

A I don't recall.

21

Q Did you, having sent out a telex such as this

22

for the purpose of avoiding potential problems, did you

23

follow up on it in any way to see whether or not you

24

were going to get an answer or why you didn't get an

25

answer if in fact you didn't get an answer, things like

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

Key

157

1
2 that?

3 A I don't recall.

4 MR. FOLEY: Mr. McAllister, has your
5 examination of the files produced anything that
6 would indicate a response to this telex?

7 MR. McALLISTER: Neither the Miami Beach
8 office nor the main office warehouse searches
9 have produced any such response

10 Q On the assumption, then, Mr. Key, that you did
11 not get a response to this particular situation--to
12 this telex, rather, Exhibit 132, is it true, then, that
13 the status, both before and after you sent this telex,
14 remained one wherein the trading activity of the stock
15 was such that you were aware of the possibility of a
16 potential problem and that, in the absence of any response
17 to this telex, remains the situation?

18 A No.

19 Q What changed it?

20 A It wasn't any--as I recall there was not any
21 trading activity or trading pattern to the stock. This
22 involved--

23 Q The telex refers to activity.

24 A As I recall--that was a form that I--more or less
25 a routine form that I would use. If I saw a large block

* * *

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

* * *

Key

171

1 something that--some handwriting with Arnie's name
2 on it.

3
4 Would that be a responding telex that should
5 have been sent back or what?

6 A Yes. I would think that, "They can't locate
7 any market, Arnie," would have probably been sent to
8 Mallett, Florida. I can't say for sure but that's what
9 I would surmise.

10 MR. FOLEY: I have not been able to locate
11 any such telex among the documents that you have
12 produced.

13 MR. McALLISTER: The wire, as it would have
14 arrived in Miami, would not have been retained. They
15 did not have a retention policy for such wires--

16 MR. FOLEY: In Miami?

17 MR. McALLISTER: In Miami, except as the
18 RR chose to keep such wires. We made a search and
19 there was no such wire. With regard to the New York
20 side of the wire, this is the original and it would
21 be the only such document.

22 Q When this went through your telex computer,
23 presumably the only place, then, where a copy of the
24 responding telex could be found would be in the duplicate
25 that you retained in New York of what went through your

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

Key

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1
2 computer. Is that correct?

3 THE WITNESS: It would be on the over-the-
4 counter--

5 MR. McALLISTER: This is the original.

6 MR. FOLEY: I am talking about the
7 response.

8 MR. McALLISTER: Response to what?

9 MR. FOLEY: There is an indication on
10 here that a message was sent back to Florida.

11 MR. McALLISTER: I'm sorry. I didn't
12 understand. Do you mean a response from Chicago
13 or LA?

14 MR. FOLEY: From Arnie.

15 MR. McALLISTER: That is the message.
16 "Miami. Cannot locate any market, Arnie."

17 MR. FOLEY: We assume that was sent.

18 MR. McALLISTER: That is correct.

19 MR. FOLEY: And you tell me Florida would
20 not keep their copy, once they get it down there
21 they would dispose of it?

22 MR. McALLISTER: That's correct.

23 MR. FOLEY: The telex went through the
24 telex computer system and went down there.

25 MR. McALLISTER: That is correct.

* * *

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EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

* * *

Key

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1

2

A I am sure that we could produce one, yes.

3

Q Where would it be?

4

5

A As I was telling you, our procedure would be to take this order with the notation on it, "Cannot locate market," stamp it at the top of that, "Return to OTC," send it on our belt down to the telegraph operator, who would pick it out, send the telex and then put it back in and send it on the belt back to the over-the-counter department.

10

11

12

Q What would they send back to the over-the-counter department, this plus the response?

13

14

A No. They just send back this. This is what they wanted back, this exhibit.

15

16

Q Where would you go in Harris, Upham to find the printed telex that was sent, if indeed one was?

17

18

19

A Well, usually we keep--I think this was the case at that time--a spool of the traffic that has taken place--that took place that day.

20

21

Q In other words, of everything that goes through the computer or through the telex?

22

23

A Through the telex, yes. I would assume that we would have some reference to it on there.

24

25

Q So you would have a roll that would have copies of what went in and out on the telex system?

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

Key

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1
2 A We should have, yes.

3 THE SPECIAL MASTER: May I interrupt?

4 MR. FOLEY: Off the record.

5 THE SPECIAL MASTER: Off the record.

6 (Discussion off the record.)

7 MR. FOLEY: Our off the record discussion
8 indicated that in February of 1969 a separate
9 daily roll of copies of the telexes sent out from
10 the OTC department is believed to have been kept
11 and this is sometimes referred to as a retrieval
12 roll for the day.

13 In addition to that, there was a second
14 retrieval roll, which constitutes copies of all
15 telexes that went through the telex system. That
16 also is maintained on a daily basis. If the response
17 that is indicated on Exhibit 147 ever was sent, as I
18 understand it now, the only place that copies of that
19 response, of the printed response, can be found would
20 be on either or both of those retrieval rolls that
21 we have just described. Is that correct?

22 MR. McALLISTER: Do you want me to
23 respond to that?

24 MR. FOLEY: Anybody. Yes.

25 MR. McALLISTER: As far as copies are

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

key

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2 concerned, yes. But as far as originals are
3 concerned, no.

4 MR. FOLEY: The original, whatever it
5 was, went to Florida and was not retained, is that
6 correct?

7 MR. McALLISTER: The original, as I under-
8 stand the concept of original, is the document that
9 was just produced and marked.

10 MR. FOLEY: The original printed telex
11 is the one that I am referring to.

12 MR. McALLISTER: Let's put it this way.
13 A printed document doesn't go through the air from
14 New York to Miami. A machine types out at that
15 end a third copy. Whether it's an original or not
16 I don't know.

17 MR. FOLEY: Mike, the telex that went to
18 Miami had the time and date stamped on it.

19 MR. McALLISTER: Right.

20 MR. FOLEY: Does this?

21 MR. McALLISTER: It has--

22 MR. FOLEY: It doesn't have a time and a
23 date the same way as the one that went down there.
24 Does this show when it was sent, what day, what time?

25 MR. McALLISTER: The normal business practice--

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

* * *

Key

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BY MR. FOLEY:

Q On Exhibit 153 which has just been marked,
could you identify for us who is--

MR. FOLEY: Mike, you might know this.
Who was account number 6827?

MR. McALLISTER: In what office?

MR. FOLEY: 153. It's in Lauderdale.
This is one of the mystery accounts, as I understand
it, by the way.

MR. McALLISTER: Leave a space there,
Dermot.

THE SPECIAL MASTER: He said leave a
space. Let's go on with the next one.

MR. FOLEY: Leave a space and they will
fill in the answer.

A

Q I would like you to identify this.

A This is a wire from the Miami office to the
over-the-counter department.

Q What's the date?

A Dated 2/13/69, which says, "Arnie, I understand
there is a market of Bartep made by Wesco quoted 6/7."

Q Is that your handwriting on there?

A No, it's not.

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1 Key 196

2 Q Do you know whose it is?

3 A No.

4 Q Do you notice on the righthand side there are
5 two names in handwriting, Arnie and Dugan?

6 A Arnie and Dugan.

7 Q Do you know whether or not this is Mr. Dugan's
8 handwriting? Would you recognize it?

9 A I don't know.

10 Q Would you recognize his handwriting?

11 A No, not necessarily.

12 Q However, it is not yours?

13 A No, it's not mine.

14 (Telex dated 2/13/69 marked
15 Plaintiffs Exhibit 158
16 for identification as of this
date.)17 MR. FOLEY: The next two are two telexes
18 ordering the sale--ordering sales. The first is
19 February 13 from Miami ordering "Sell 500 Bartep at
20 6," and the next is the following day, February 14,
21 from Miami, "Sell 500 Bartep at 6."22 (Telex dated 2/13/69 marked
23 Plaintiff's Exhibit 159 for
24 identification as of this
date.)25 (Telex dated 2/14/69 marked
Plaintiff's Exhibit 160 for

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
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Key

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identification, as of this
date.)

MR. FOLEY: In the interest of saving
time, I would like to ask you--you will note on
159 there is some more handwriting which I take it
indicates the possibility, probability or a likelihood
that a response as worded in handwriting on here
was sent to this Exhibit 159. I would like just to
agree with you that our colloquy testimony, as
relevant to originals and copies of such responses in
past exhibits this morning, is equally applicable
to this and we will not go into it in any further
detail.

MR. McALLISTER: Yes.

A This appears to be a wire sent to the Miami
office from the over-the-counter department dated
February 14, 1969, from Jim OTC.

Q Who is he?

A I don't know. I couldn't say for sure who this
Jim is.

MR. FOLEY: Can we mark it?

(Telex dated 2/14/69 marked
Plaintiff's Exhibit 161 for
identification as of this
date.)

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

Key

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MR. FOLEY: Once again in the interest of saving time, Mr. McAllister, will we agree that the telex, the actual printed telex sent, if any, is consistent with this Exhibit 161--that could be found only in the retrieval roll?

Off the record.

(Discussion off the record.)

MR. FOLEY: And that our comment prior to this about these handwritten documents, the same applies here?

MR. McALLISTER: Yes.

THE WITNESS: I have a wire here from Miami, the over-the-counter department, dated 2/14/69. It says "Jim RCM re: Bartep will not deal with Wesco. FL."

Q You do not know who sent it?

A No.

Q Presumably, somebody in Miami knew not to deal with Wesco.

A Yes.

(Telex dated 2/14/69 marked Plaintiff's Exhibit 162 for identification as of this date.)

THE SPECIAL MASTER: Go to the next one.

* * *

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

* * *

Key

201

MR. FOLEY: Here we go back on the record.

A handwritten instruction for a wire
presumably. The time stamp is March 6 at 9:35 a.m.
from Lobe to Mallett in Florida.

(Wire dated March 6, 1969,
marked Plaintiff's Exhibit
167 for identification
as of this date.)

MR. FOLEY: You can identify the next
one.

THE WITNESS: I have a wire from the
Lauderdale office to CRD.

MR. FOLEY: Who is that?

MR. McALLISTER: I will stipulate
it means cage.

MR. HARRIS: You said Lauderdale office?

THE WITNESS: Excuse me. I mean Miami. You
are right.

MR. McALLISTER: I'm sorry, I withdraw that
comment.

THE WITNESS: It says "Lobe"--

MR. McALLISTER: Don't read it. It speaks
for itself. Just give us the date.

THE WITNESS: 3/6/68.

Q There is some handwriting on that?

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1 Key 202

2 A Yes.

3 Q Can you identify who wrote it?

4 A No.

5 Q Do you recognize the name Jerry Boucher?

6 A Boucher, yes.

7 Q Who is he?

8 A He is an officer of the firm.

9 Q What office did he hold at the date of that

10 telex, do you know?

11 A I think at that time he was an executive vice

12 president of the firm.

13 Q What is he today?

14 A Executive vice president of the firm.

15 Q What did he have to do with Bartep or with

16 Fisher?

17 A I believe at that time he was the supervisor

18 officer for the Miami office.

19 Q In the process of the discussions you had at any

20 time respecting the Fisher account and Bartep shares, did

21 you ever discuss this matter with Mr. Boucher?

22 MR. McALLISTER: I object to the question

23 as to any time.

24 Q Any time from October of 1968 through, say, through

25 1969, and exclude from your answer any discussions in the

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

203

2

presence of lawyers.

3

MR. McALLISTER: I will object to that

4

as being after the complaint.

5

THE SPECIAL MASTER: Why don't you rephrase

6

the question, Mr. Foley.

7

Q Did you ever discuss Bartep or Fisher with

8

Mr. Boucher?

9

THE SPECIAL MASTER: Between the date

10

of the--

11

MR. FOLEY: Yes.

12

THE SPECIAL MASTER: Between what?

13

MR. FOLEY: From October of '68

14

through 1969.

15

MR. McALLISTER: I will object to the

16

form of the question as it seeks information after

17

the complaint was filed.

18

MR. FOLEY: It doesn't seek any--

19

THE SPECIAL MASTER: I will allow it.

20

Q Would you answer it?

21

A I don't recall speaking to Mr. Boucher.

22

Q Have you any reason to believe that Mr. Boucher

23

has any information about the account of Fisher or

24

the problems of Bartep during the period that is the

25

subject of this law suit, October of '68 through 1969?

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

1

Key

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2

MR. McALLISTER: I will object to the

3

form of the question.

4

THE SPECIAL MASTER: I will allow it.

5

THE WITNESS: Could you repeat

6

it for me, please.

7

(Question read.)

8

A I am sure that Mr. Boucher was aware of the

9

problem.

10

Q What makes you sure of that?

11

A Well, I would think that--are you talking about

12

the period--just that period at that time?

13

Q That period when the Fisher order was in

14

October of '68 and then the problem continued through

15

into 1969.

16

A I don't know when or really how much Boucher got

17

involved.

18

MR. McALLISTER: Do you have any knowledge

19

of it?

20

THE WITNESS: No.

21

Q Will it refresh your recollection if I asked

22

you this. Do you know whether or not Mr. Boucher

23

received a letter from New York or Florida about this

24

specific situation of the Fisher account?

25

MR. McALLISTER: From whom?

EXCERPTS FROM DEPOSITION OF DEFENDANT, BY ALBERT LENOIR
KEY, ON JUNE 9, 1972

Key

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2 MR. FOLEY: From anybody.

3 A I do not.

4 MR. McALLISTER: Including counsel for
5 plaintiff?

6 MR. FOLEY: I am not including--I am
7 excluding only defendant's own attorneys. I am
8 asking him does he know.

9 A No, I do not.

10 Q Does this refresh your recollection?

11 A No.

12 (Telex dated 3/6/69 marked
13 Plaintiff's Exhibit 168 for
14 identification as of this
date.)

15 MR. FOLEY: The next is a handwritten
16 instruction to send a telex to Lil in Miami from
17 Smythe, dated March 13. It begins with the words
18 "Please call Jean Ackerman."

19 (Wire dated March 13, 1969,
20 marked Plaintiff's Exhibit
21 169 for identification
as of this date.)

22 MR. FOLEY: The next is March 20, a telex
23 from counsel to Lobe beginning, "Do we have 5000
24 Bartep which can be shipped?"

25 (Telex dated 3/20/69

* * *

Received 8 copies of the within
Supplementary Appendix to Plaintiff Appellee's Brief
this 21 day of Jan, 1975.

Sign Nancy Shawl Gabel
Jefford Woody Carter & Hays
For: _____ Esq(s).

Att'ys for Life Insurance Appellant

